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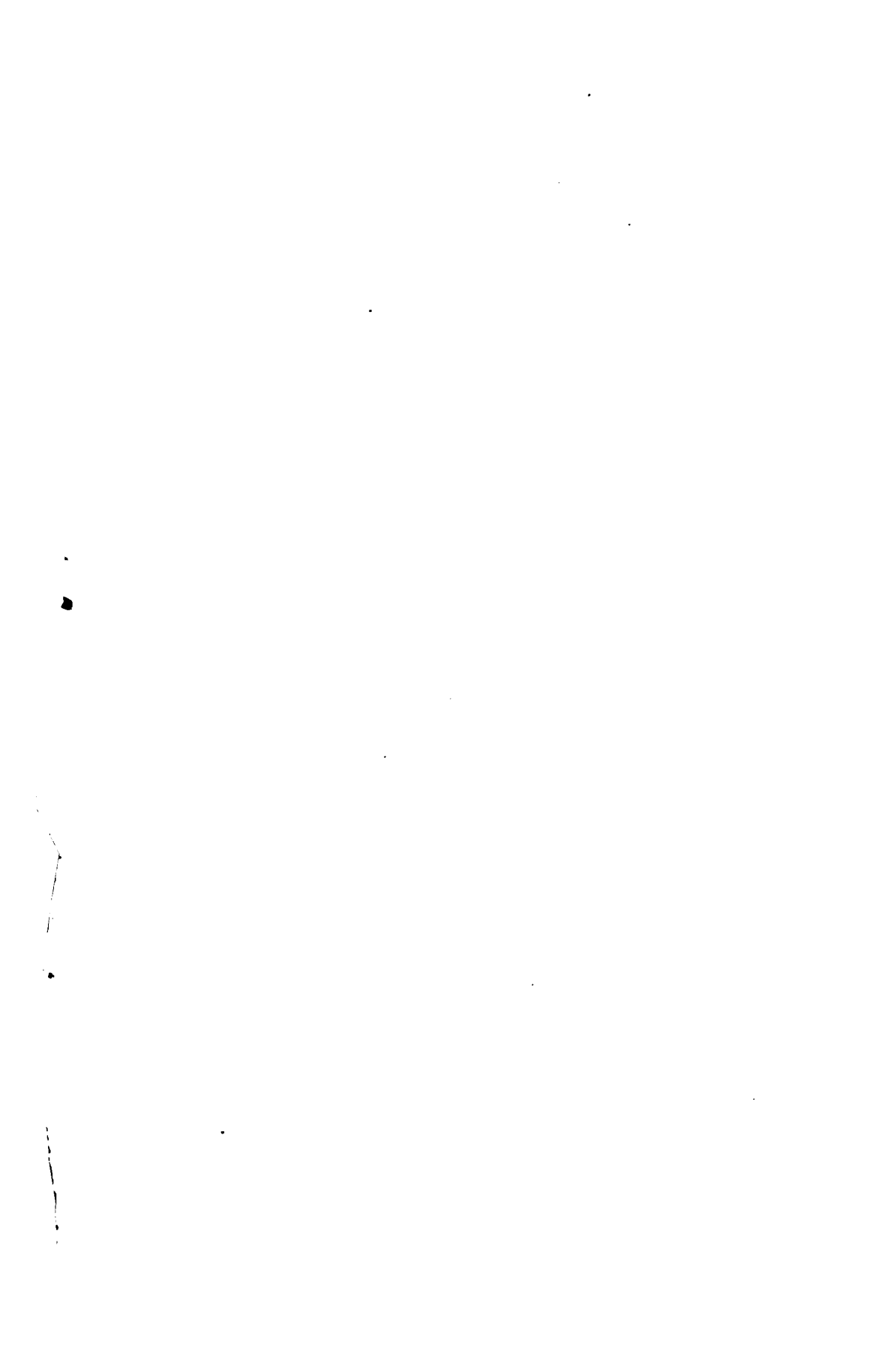
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A DIGEST
OF ALL THE
DECISIONS OF THE
COURT OF APPEALS OF
KENTUCKY

**REPORTED IN THE KENTUCKY OPINIONS, VOLUMES ONE
TO THIRTEEN, INCLUSIVE, COVERING THE PERIOD
FROM JUNE 13, 1866, TO MAY 29, 1886**

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KENTUCKY DIGEST

A DIGEST OF ALL THE DECISIONS CONTAINED IN THE
KENTUCKY OPINIONS AND REPORTED IN VOL-
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II. ANOTHER ACTION PENDING.

§ 7. Pendency of another action.

Where defendant avers that he was sued in equity on the notes upon which the present action is founded, but fails

to allege that the suit was pending when his answer was filed, it is not sufficient to bar the action.

Johnston v. Walker, 6 Ky. Opin. 464.

V. DEATH OF PARTY AND REVIVAL OF ACTION.

(A) ABATEMENT OR SURVIVAL OF ACTION.

§ 58. Actions and proceedings which abate.

Where an action has abated by the death of a party, and judgment was rendered in the case without revivor, revivor is not dispensed with by consolidating the abated action with an action by the personal representatives of the deceased against the heirs for settlement of the estate.

Mullins v. Emerson, 7 Ky. Opin. 642.

§ 59. Death of plaintiff.

An action prosecuted for the benefit of a wife, her husband being merely a formal party plaintiff, will not abate on the death of the husband.

Doom v. Doom, 3 Ky. Opin. 441.

§ 60.—Sole plaintiff.

Where a citizen is prosecuting an action in the name of the state for a change in a public road, the action will abate on his death, unless some other citizen voluntarily comes into court and asks to be allowed to take his place, and will not pass to his representatives and heirs.

Yeager's Admr. v. Holcombe, 7 Ky. Opin. 522.

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(B) CONTINUANCE OR REVIVAL OF ACTION.

§ 72. Persons required or entitled to continue or revive action.

The provisions of § 569, Civil Code, relating to revival of actions, applies

to executors, administrators and such representatives as are personal to the decedent heirs, and does not apply to heirs who represent their own interest only, title having descended to them; and there is no provision of law prohibiting revival of a suit for realty against the heirs who have become invested with the title until the suit shall be barred by lapse of time, or an order abating the suit shall be entered by the court.

Lee's Exrs. v. Graham's Exrs., 1 Ky. Opin. 602.

Where, after remand of a cause by the Court of Appeals, the defendant filed an amended answer without an order of revival, at the instance of the plaintiff's administrator, defendant waived his right to insist upon and claim revivor.

Turley v. Couchman's Admr., 7 Ky. Opin. 54.

Where a sale of land is made during the life of the owner, but had not been reported or confirmed at the time of her death, the suit should be revived in the name of both the personal representative and heirs.

Murphy v. Fryer, 10 Ky. Opin. 814.

One having an equity in a judgment is a necessary party, either plaintiff or defendant, to a suit to revive the judgment.

Rice's Admrs. v. Hounshell, 10 Ky. Opin. 848.

§ 73. Persons against whom action may be continued or revived.

In an action against a defendant who dies during its pendency it may be revived against his personal representative with demand or affidavits being previously made.

Apperson's Exr. v. Hazelrigg, 10 Ky. Opin. 947.

§ 74. Time of taking proceedings.

Where appellant filed an answer to a cause of action setting out a good defense thereto, at the October term of court, 1860, and March, 1861, the cause was transferred to the equity docket, after a survey was made as set out in the answer; and the case was continued till October term, 1863, when one of the defendants died, and the

case was continued without effort to revive the action; and appellee (complainant) at the April term, 1865, took a rule against appellant to prepare for trial at the July term, but the case lingered on the docket until October, 1866, when judgment was rendered against appellant; appellant was guilty of gross negligence and not entitled to relief.

Haynes v. Simons, 1 Ky. Opin. 592.

Although the time has passed for a revivor according to the summary mode prescribed by the Code (1876), Title 11, still that mode of revivor does not impair the right to bring any necessary party before the court by other appropriate means.

Gardner's Admr. v. Roberts, 11 Ky. Opin. 873.

An order to revive an action, in case of the death of a party to it, can not be made without consent, unless within one year after the time when it could have been first made.

Apperson v. Fulkerson, 13 Ky. Opin. 801.

§ 75. Application and proceedings thereon.

The mere summary record of revivor presented by the code of practice, does not abolish the sure mode by petition according to the common law.

Smith v. Riley, 3 Ky. Opin. 497.

A revivor of an action by an administrator must be upon duly executed notice, or by service of process on the amended petition, or by service of the order of revivor.

Bryan v. Wade, 3 Ky. Opin. 213.

A cause may be revived by rule or notice to those representing a deceased litigant, but the notice must be served at least ten days before the revivor can be made and must name the parties.

Rogers v. Burberidge's Committee, 8 Ky. Opin. 611.

To be sufficient a petition to revive a judgment must describe the judgment desired to be revived, so as to enable the defendants to defend.

Rice's Admrs. v. Hounshell, 10 Ky. Opin. 848.

VI. WAIVER OF GROUNDS OF ABATEMENT AND TIME AND MANNER OF PLEADING IN GENERAL.

§ 78. Defects and objections which may be waived.

The voluntary submission of a cause constitutes a waiver of the right to question the propriety of the proposed revivor, where both parties proceeded as though the order of revivor had been formally made, and defendant in effect consented that it should be made.

Bergan v. Garnett, 6 Ky. Opin. 11.

ABDUCTION.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 1. Nature and elements of offenses.

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I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 1. Nature and elements of offenses.

In the statute providing for punishment of those who unlawfully take and detain a woman against her will, with intent to carnally know her, the term "woman" is used synonymously with "female," and the accused is guilty whether the woman is over fourteen years of age or under said age.

Howell v. Commonwealth, 12 Ky. Opin. 199.

II. PROSECUTION AND PUNISHMENT.

§ 4. Indictment or information.

§ 5.—Requisites and sufficiency.

An indictment charging one taking and detaining a woman against her will with intent to have carnal knowledge of her is not subject to demurrer because of stating two offenses in one charge, that of taking or detaining, since the words are merely descriptive of the offense denounced, and either of them constitutes a single of-

fense, the purpose of the taking and detention being the gravamen of the offense.

Owens v. Commonwealth, 12 Ky. Opin. 197.

An indictment is sufficient which charges, after alleging the time and venue, that the accused "did unlawfully detain Mary Selvey, a woman, against her will with the intent to have carnal knowledge with her himself by taking hold of her with his hands."

Howell v. Commonwealth, 12 Ky. Opin. 199.

Under the statute (Sec. 9, Art. 4, Ch. 29, General Statutes) providing that "whoever shall unlawfully take and detain any woman against her will with intent to have carnal knowledge with her himself shall be confined to the penitentiary," etc., an indictment charging the unlawful detention of the female, "by placing his hands upon her and speaking to her with intent to have carnal knowledge with her," etc., it is insufficient because not charging that the detention was against her will.

Hoskins v. Commonwealth, 13 Ky. Opin. 505.

Where the statute describes facts constituting an offense, an indictment under such statute should follow the statute, and to be good, an indictment for detaining a woman with intent to have sexual intercourse with her against her consent, an indictment should allege that the woman was detained against her will, and with the intent to have carnal knowledge of her without her consent.

Everheart v. Commonwealth, 13 Ky. Opin. 564.

ACCEPTANCE.

By creditors, see Assignments for Benefit of Creditors, § 44.

Liability of acceptor, see Bills and Notes, § 73.

Of conveyance, when operates as waiver of defect in title, see Vendor and Purchaser, § 149.

Of deed, see Deeds, §§ 63, 65.

Of goods purchased and delivered, see Sales, § 177.

Of order, see Bills and Notes, §§ 66, 86.
Of property dedicated to public use, see Dedication, § 30.

Of proposal, see Contracts, I, B.

Of report of sale, see Judicial Sales, § 30.

Presumption of, see Deeds, § 63.

ACCESSION.

§ 1. Nature and effect in general.

The right by accession is acquired by adding other material to that of another individual taken innocently by skill and labor, so changing the material that it can not be restored to the owner in its original form.

Ratcliff v. Gallagher & Holman, 5 Ky. Opin. 589.

Where the material operated on by a mechanic has not been changed, and the same inherent and characteristic qualities exist that composed the material when it was removed from its place in the earth, the property therein remained in the owner of the quarry and not in the person who raised and dressed the stone.

Ratcliff v. Gallagher & Holman, 5 Ky. Opin. 589.

The right by "specification" can only be acquired when, without the accession of any other material, that of another person, which had been used by the operator innocently, has been converted by him into something specifically different in the inherent and characteristic qualities which identified it.

Ratcliff v. Gallagher & Holman, 5 Ky. Opin. 589.

ACCESSORIES.

See Criminal Law, § 67.

Instruction as to, see Homicide, § 305.
When guilty as principals, see Homicide, §§ 30, 83.

ACCIDENT.

Accidental killing, see Homicide, § 125.

ACCIDENT POLICY.

See Insurance, XIII.

ACCOMPLICES.

In gambling, see Criminal Law, § 67.
Instruction as to weight of testimony,
see Criminal Law, § 780.

Liabie as principals, see Criminal
Law, § 67.

ACCORD AND SATISFAC- TION.

§ 6. Part payment.

§ 8.—Consideration in general.

§ 9.—By bills, notes, or checks.

§ 13. Conveyance or surrender of
property, rights or claims.

§ 15. Execution of accord as satis-
faction.

§ 19.—Acceptance of new agree-
ment.

§ 6. Part payment.

§ 8.—Consideration in general.

Where a judgment defendant paid,
in full satisfaction of the judgment, a
sum less than the face of the judg-
ment, when the whole amount called
for by the judgment was due, without
additional consideration, such payment
does not discharge the entire judg-
ment debt.

Moore v. Hayden, 7 Ky. Opin. 255.

Where from all the facts it appears
that defendant was bound to pay
plaintiff a certain sum past due and
that plaintiff was entitled to receive
that amount, an agreement to take a
less sum is without consideration, and
is not a bar to an action for the re-
mainder, there being no circumstances
to serve as a consideration for the
agreement.

Robbins v. Spurgin, 7 Ky. Opin.
377.

§ 9.—By bills, notes, or checks.

There can be neither accord nor
satisfaction in a case where the note
of a third person is given for another's
debt, where the same is not given or
accepted, or agreed to be accepted, in
discharge or satisfaction of the debt.

Hart v. Trustees of Princeton
College, 10 Ky. Opin. 233.

§ 13. Conveyance or surrender of
property, rights or claims.

A proposition and promise by letter
to transfer property in satisfaction of

a debt, and an acceptance thereof,
can not have the effect of an accord
and satisfaction, until there is an
actual transfer of something of value,
and the creditor is placed in condition
to get possession of the property.

Seminon v. Woodson, 3 Ky. Opin.
663.

§ 15. Execution of accord as satisfac-
tion.

§ 19.—Acceptance of new agreement.

In a suit on an account it is error
for the court to charge the jury that
"If the jury believe from the evidence
that after rendering of the services
charged in the first two items of the
account Dr. Ferguson and defendant
had a settlement, and that upon such
settlement Ferguson fell in debt to
defendant, then the presumption of
the law is that these items were em-
braced in such settlement," for such a
presumption is not conclusive, and
the fact should have been left for
the jury to consider and to determine
whether such items were so embraced.

Ferguson's Admr. v. Kouns, 10 Ky.
Opin. 761.

ACCOUNT.

I. RIGHT OF ACTION AND DE- FENSES.

§ 1. Nature and grounds of right
to an account.

§ 5. Mutual accounts.

§ 6. Complicated transactions or
circumstances.

II. PROCEEDINGS AND RELIEF.

§ 13. Equitable actions.

§ 17.—Pleading.

§ 18.—Evidence.

§ 19.—Trial or hearing, and in-
terlocutory judgment or de-
crees.

§ 20.—Taking and stating ac-
count, and reference therefor.

III. OPERATION AND EFFECT OF ACCOUNTING.

§ 23. Conclusiveness of voluntary
accounting.

See Executors and Administrators,
XI; Guardian and Ward, VI.

See Limitation of Actions, § 29.

Account books as evidence, see Evi-
dence, § 354.

Accounting by trustee for rents and profits, see Trusts, § 183.

Admissibility of account books, see Evidence, § 350.

By attorney to client, see Attorney and Client, §§ 127, 129.

By committee of insane person, see Insane Persons, § 42.

By pledgee for excess of proceeds, see Pledges, § 33.

By tenant, see Landlord and Tenant, § 326.

By trustee, see Trusts, VI.

Conclusiveness of, see Account, § 23.

For taxes collected, see Taxation, § 557.

Operation and effect of, see Account, III.

Oral testimony of contents of account book, see Evidence, § 160.

Proceeding to compel, see Executors and Administrators, § 472.

Proceedings for accounting by administrator, see Executors and Administrators, XI, B.

Settlement of account between partners, see Partnership, §§ 81, 311, 315, 318.

I. RIGHT OF ACTION AND DEFENSES.

§ 1. Nature and grounds of right to an account.

Where an account was made with a defendant, of "\$600.00 on deposit, which I am to pay on demand," it was held that without demand or failure to pay, or special contract, it will not bear interest, as the writing evidenced a mere deposit and not a loan.

Chambers' Admr. v. McAdams, 3 Ky. Opin. 667.

The execution of notes for accounts is prima facie evidence that the accounts were thereby settled.

Shuck v. Lawler, 2 Ky. Opin. 656.

§ 5. Mutual accounts.

If appellee had not correctly kept his books it was not the fault of appellant, but it was his fault when he came to settle with appellee that he did not there and then disclose the fact that more tobacco had been delivered to him than was charged on the books of appellee.

Landrum v. Farmer, 5 Ky. Opin. 447.

§ 6. Complicated transactions or circumstances.

Where one undertook the management of a farm of an old and infirm woman, consisting of four hundred acres of land, slaves, stock, farming implements, and crops, but kept no accounts of his transactions, thereby rendering it impossible to make a correct settlement, the proper procedure is, either to charge him with such funds as ought to have been realized from the farm by a prudent and industrious man, or treat him as having purchased the stock, crops, farming implements and supplies when he took possession, and as having rented the farm and hired the slaves.

Hamilton's Admr. v. Marshall, 7 Ky. Opin. 554.

II. PROCEEDINGS AND RELIEF.

§ 13. Equitable actions.

§ 17.—Pleading.

In an action on account, an answer denying that defendants ever agreed to pay a certain item of account, or that such bill was ever presented to them for payment, is insufficient, as the defense does not go to the entire claim.

Eaves, Weir & Dade v. Milliken, 7 Ky. Opin. 437.

The allegations in a petition on a merchant's account, that the debtor is indebted to him in the sum of fifty-five dollars for goods and merchandise sold and delivered by the plaintiff to the defendant, the particulars of which are set out in an account filed therewith imports prima facie, that the price had also been agreed upon or that the goods were reasonably worth it, and must be deemed to set out a cause of action.

Dunlevy & Co. v. O'Bannon & Son, 2 Ky. Opin. 670.

Where a petition on an action of account did not refer to the exhibit attached, as a part thereof, nor make a bill of particulars, an answer thereto was not necessary.

Bonysson v. Thompson & Gilson, 3 Ky. Opin. 355.

Where a petition in an action on account does not refer to an attached

exhibit as a part thereof or make a bill of particulars, the defendant is not required to admit or deny particular items of the account.

Bonysson v. Thompson & Gilson,
3 Ky. Opin. 355.

§ 18.—Evidence.

Evidence introduced by a defendant tending to prove an indebtedness of the plaintiff on the accounts relied on as set-offs should be submitted to the jury, that they may determine what parts, if any, or how much of the account had been proved, and not left to a peremptory instruction limiting the credits to the admission in the reply.

Boone v. Clarkson, 2 Ky. Opin.
601.

The statements of the defendant, made to third parties, in relation to his indebtedness to the plaintiff, is competent evidence in an action on an open account.

Ward v. Claxton & Jones, 5 Ky.
Opin. 314.

Where there is a written agreement showing a settlement of accounts between parties, the onus devolves upon the party alleging mistakes therein, and until they are shown to exist, the writing must prevail, and it is not sufficient to show that the parties had other dealings and various transactions prior to the date of the writing, but it devolves on the one complaining to show that payments made prior thereto were not settled and were omitted by mistake.

Chandler v. Rowe's Admr., 2 Ky.
Opin. 254.

The receipts and notes exhibited by appellee were prima facie evidence of a full settlement of accounts between the parties, up to the date of those papers, and the burden of proof was on appellant to rebut the legal presumption arising from the execution and acceptance of those papers, but it was error to say to the jury, that unless they were satisfied that said papers were not executed in full discharge of the accounts, the law was for appellant.

Rankin & Co. v. Chenerworth, 5
Ky Opin. 515.

§ 19.—Trial or hearing, and interlocutory judgment or decree.

A court may, in its discretion, allow further time for preparation and to retry the question growing out of accounts between the parties to the suit.

Dent v. Hendrick & Holt, 7 Ky.
Opin. 156.

In a suit on account, where the plea of limitations is filed with the answer, a refusal of the court to give an instruction for the defendant, that a promise to settle mutual subsisting accounts or an acknowledgment that he did not dispute plaintiff's account, but that he had a larger account against him, is not such an acknowledgment as will take the accounts of the plaintiff out of the statute of limitations, is erroneous.

Boone v. Clarkson, 2 Ky. Opin.
601.

§ 20.—Taking and stating account, and reference therefor.

Where an action is brought on account, and set-off and counter-claims are filed, and a settlement asked of accounts between the parties, one dealing as a cotton broker, in which profits and losses in cotton speculations are involved, neither party is entitled to have a loss adjusted which took place after the suit was filed, since the determination should be had as to the state of the accounts at the date when the action was begun.

Gunther v. Shepherd, 13 Ky. Opin.
456.

III. OPERATION AND EFFECT OF ACCOUNTING.

§ 23. Conclusiveness of voluntary accounting.

Where appellant, in his answer, pleads as a set-off against the demands of the appellee, three several notes executed by the latter to the former, subsequent to the transactions involved in litigation, it is prima facie evidence that all antecedent indebtedness on either side, except the amount of the note first executed, was thereby closed.

Millett v. Millett, 5 Ky. Opin. 593.

ACCOUNT, ACTION ON.

- § 16. Book account or book debt.
 § 21.—Pleading.

Between landlord and tenant, see
 Landlord and Tenant, §§ 227, 232.

§ 16. Book account or book debt.

The entries in an account book kept by a party to the action are competent against him as admissions, and though in writing, still like oral admissions, the whole of the entries in the same book relating to the same subject must be taken together, as well as those made by the party against himself and those for himself.

Millett v. Millett, 5 Ky. Opin. 593.

§ 21.—Pleading.

A petition on an account states no cause of action which declares that the defendant is indebted to plaintiff blank dollars, evidenced by an account filed amounting to blank dollars, and prays judgment for blank dollars.

Crawford v. Combs, 8 Ky. Opin. 200.

ACCOUNT STATED.

- § 4. Mode of stating and settling.
 § 11. Opening and correcting.
 § 18. Pleading.

§ 4. Mode of stating and settling.

Where both parties show errors and their contracts are so confused as to render an accurate statement highly difficult, the note executed by one to the other will be taken as a basis of settlement.

Coffee v. Platt, Bucklin & Co., 3 Ky. Opin. 593.

§ 11. Opening and correcting.

Courts will, by proper proceeding, correct mistakes innocently made by parties in the settlement of their accounts.

Moore v. Davis, 4 Ky. Opin. 39.

§ 18. Pleading.

An answer that there is a mistake in a settlement to plaintiff's prejudice of \$150, without an allegation showing whether the mistake was by omission to include items, or in some other way, constitutes no defense.

Price v. Buckler, 6 Ky. Opin. 582.

ACKNOWLEDGMENT.**II. TAKING AND CERTIFICATE.**

- § 14. Authority to take.
 § 23. Mode of taking acknowledgment.
 § 25.—Of married woman.
 § 28. Making and requisites of certificate.
 § 33.—Signature and seal.
 § 35. Contents of certificate.
 § 37.—Acknowledgments of particular persons or officers.
 § 40. Errors and defects in certificate.

III. OPERATION AND EFFECT.

- § 50. Surplusage in certificate.
 § 55. Conclusiveness of certificate.

By wife, see Husband and Wife, §§ 15, 212.

Certificate of acknowledgment, see Mortgages, § 59.

Failure to acknowledge or witness deed, see Deeds, § 44.

Of mortgage by married women, see Mortgages, § 59.

II. TAKING AND CERTIFICATE.

§ 14. Authority to take.

Where acknowledgment to a deed states that the grantor appeared before the "Clerk of Logan County," and from the caption it appears that the acknowledgment was taken in the "County Clerk's office," it is good, though the word "Court" is omitted after the word "County"; but as it must be judicially known that there was no nominee clerk of "Logan County" while there was a clerk of the County Court of said county, it is presumed that he, as such, was by law authorized to take the acknowledgment.

Berry v. Wheatley, 2 Ky. Opin. 269.

§ 23. Mode of taking acknowledgment.

§ 25.—Of married woman.

The law does not allow the acknowledgment of a deed by a married woman to be simultaneous with the acknowledgment by the husband.

Knott v. Johnston, 11 Ky. Opin. 271.

§ 28. Making and requisites of certificate.

§ 33.—Signature and seal.

Where an acknowledgment of a mortgage is taken before a deputy clerk, and the clerk writes out the certificate and puts the mortgage and certificate to record, but fails to sign the certificate either on the record or the mortgage, after his term of office expires his successor may legally sign the name of the former clerk both to the mortgage certificate and to the certificate on the record, and such mortgage will have the same force and validity that it would have had if signed by the clerk who wrote the certificate.

Sutton v. Puckett, 11 Ky. Opin. 89.

§ 35. Contents of certificate.

§ 37.—Acknowledgments of particular persons or officers.

Where at the time a wife acknowledges a mortgage she is out of sight of her husband and far enough out of the way to be out of his hearing, it is a sufficient compliance of the statute requiring that she should be examined separate and apart from her husband.

Reidbaugh v. Grover, 11 Ky. Opin. 34.

§ 40. Errors and defects in certificate.

Where a certificate of acknowledgment does not show that the county judge affixed to it the seal of his court, nor caused it to be done by the clerk of the court; and the certificate of the clerk is verified by his official seal, and not by the seal of the county court, it is necessary that it affirmatively appear that the certificate of the county judge is made under the seal of his court.

Cross v. Clarkson, 5 Ky. Opin. 745.

III. OPERATION AND EFFECT.

§ 50. Surplusage in certificate.

Where the grantor, being the owner of the land in fee, sold the same to her grantee for a valuable and full consideration, and by a deed executed jointly with her husband conveyed the same, with covenants of general warranty, and the certificate of acknowledgment recites that she appeared before the commissioner of deeds and

severally acknowledged that she executed the same as her free act and deed for the uses and purposes therein expressed; that she was examined separately and apart from her husband, and the contents and effect of the deed explained to her, and she freely acknowledged the same, with the intention thereby to renounce, give up and quit-claim her two-thirds and right of dower in the estate, the concluding sentence in the certificate is inconsistent and irreconcilable with the residue thereof, and is mere surplusage, as it does not apply to any estate held by the grantor, and should, therefore, be disregarded.

Sim v. Waggoner, 5 Ky Opin. 308.

§ 55. Conclusiveness of certificate.

The certificate of an officer that a deed was acknowledged before him, when he is not authorized to take acknowledgments, furnishes no evidence of the execution of the deed.

Harlan v. Hardin, 8 Ky. Opin. 587.

ACQUIESCENCE.

Estoppel by, see Estoppel, § 89.

ACTION.

I. GROUNDS AND CONDITIONS PRECEDENT.

§ 1. Nature and elements of cause of action.

§ 10. Conditions precedent.

§ 11. Notice, demand, and tender.

§ 12. Defenses in general.

§ 13. Persons entitled to sue.

II. NATURE AND FORM.

§ 16. Nature of remedy by action.

§ 21. Legal or equitable.

§ 29. Form of action.

III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE.

§ 39. Joinder of causes of action at common law.

§ 43. Joinder of causes of action under Codes and practice acts.

§ 44.—Forms of action.

§ 45.—Nature and grounds of action in general.

§ 46.—Legal and equitable.

§ 50.—Parties and interest involved.

§ 54. Consolidation of actions.

§ 55.—In general.

§ 57.—Actions which may be consolidated.

§ 59.—Operation and effect.

IV. COMMENCEMENT, PROSECUTION AND TERMINATION.

§ 63. Delay in commencing.

§ 64. Proceedings constituting commencement.

§ 70. Abandonment.

See Abatement and Revival; Assignments, IV; Bills and Notes, VII; Bonds, V; Conspiracy, I, B; Continuance; Corporations, VII, F; Counties, VI; Executors and Administrators, X; False Imprisonment; Forcible Entry and Detainer; Fraud, II; Guardian and Ward, V; Husband and Wife, VI; Infants, VII; Insane Persons, IX; Judgment, XXI; Landlord and Tenant, VIII, B; Libel and Slander, IV; Limitation of Action; Lis Pendens; Malicious Prosecution, V; Municipal Corporations, XV; Parties; Partnership, IV, D; Principal and Agent, III, F; Replevin; Trespass, II; Trover and Conversion, II; Trusts, VII, C; Venue.

Against heirs and distributees, see Descent and Distribution, § 137.

Against lunatic, see Insane Persons, § 92.

Against members of county court, see Courts, § 208.

Against state, see State, VI.

Assignment of right of action, see Assignments, § 21.

Bar of right of action, see Accord and Satisfaction, § 8.

Between co-sureties, see Principal and Surety, § 200.

Between partners, see Partnership, III, C.

By executors or administrators, see Executors and Administrators, § 425.

By infant, see Infants, § 7.

Enjoining prosecution of action, see Injunction, § 25.

Equity jurisdiction to avoid multiplicity of action, see Equity, § 51.

For abuse of legal process, see Process, § 171.

For accounting by administrator, see Executors and Administrators, XI, B.

For assault and battery, see Assault and Battery, I, B.

For breach of contract, see Contracts, VI; Vendor and Purchaser, VII, B.

For breach of covenant, see Covenants, IV.

For breach of tavern keeper's bond, see Intoxicating Liquors, § 88.

For partition, see Partition, II.

For purchase-price, see Sales, VII, E; Vendor and Purchaser, § 304.

For rent not due—Allegation of fraud, see Attachment, § 39.

For settlement of estate, see Executors and Administrators, §§ 314, 471, 473.

Of foreclosure of chattel mortgage, see Chattel Mortgages, § 268.

On account, see Account, I; Account, Action on.

On administrator's bond, see Executors and Administrators, § 537.

On attachment bond, see Attachment, § 341.

On award, see Arbitration and Award, § 85.

On bail bond, see Bail, §§ 81, 83.

On cashier's bond, see Banks and Banking, § 55.

On indemnity bond, see Indemnity, § 15.

On insurance policies, see Insurance, XVIII.

On judgment, see Judgment, XXI.

On officer's bond, see Officers, § 134.

On receiver's bond, see Receivers, § 218.

On recognizance, see Recognizances, § 12.

On replevin bond, see Replevin, § 127.

On sheriff's bond, see Sheriffs and Constables, § 160.

On subscription, see Subscription, § 21.

Recovery of taxes paid, see Taxation, § 543.

Settlement of estate, see Executors and Administrators, § 506.

To set aside attachment, see Attachment, § 260.

To set aside judicial sale, see Judicial Sales, § 45.

I. GROUNDS AND CONDITIONS PRECEDENT.

§ 1. Nature and elements of cause of action.

Where a joint judgment against T., as principal, and F. as surety in a note, was replevied, and T., without making F. a party, enjoined the enforcement of the replevin bond; and appellant instituted suit as bondsman

for T., against F., former bondsman, it does not constitute a cause of action.
Fish v. Glass, 3 Ky. Opin. 177.

§ 10. Conditions precedent.

Though no order is made by the court as to a defendant not then served with process, the action will stand by operation of law.

Bandy v. Roberts' Admrs., 2 Ky. Opin. 568.

§ 11. Notice, demand, and tender.

No demand before beginning a suit on an obligation for money payable on demand is necessary; the summons itself is a sufficient demand.

Reidbaugh v. Grover, 11 Ky. Opin. 34.

§ 12. Defenses in general.

One who asserts that he is assignee in bankruptcy can not defeat the proceedings in a state court against the bankrupt without pleading the facts and proving what he pleads.

Davis' Assignee v. Smallgood, 11 Ky. Opin. 441.

While a defendant prior to the adoption of the civil code could not plead an equitable defense in an action ordinary, but was required to go into equity, since the adoption of the code he is required to plead such defense whether equitable or ordinary.

Griffith v. Adams, 13 Ky. Opin. 751.

§ 13. Persons entitled to sue.

An action can not be maintained in the name of one for the sole benefit of another under a champertous agreement.

Wells v. Wilson, 2 Ky. Opin. 144.

II. NATURE AND FORM.

§ 16. Nature of remedy by action.

An action to enforce the performance of a personal duty, and not to secure the possession of land, is not a local action.

Thompson v. Cooper, 4 Ky. Opin. 336.

§ 21. Legal or equitable.

It is not reversible error to try the issues of fact by a jury in a common law court, in an action that should have been brought in a court of equity.

Schriener v. Noland, 3 Ky. Opin. 617.

A rescission of a contract to sell land can not be had in an action at law, the remedy being by suit in equity.

Fennessey v. Abbott, 5 Ky. Opin. 42.

§ 29. Form of action.

Section 39 of the Civil Code makes a new rule with respect to the form of action on joint liabilities, but it does not affect the rights and equities of the defendants to the same action.

Hughes v. Gray, 1 Ky. Opin. 1.

III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE.

§ 39. Joinder of causes of action at common law.

Where causes are consolidated the judgment rendered therein is binding on all the parties served with process in either action.

Cummins v. Whaley's Admr., 5 Ky. Opin. 246.

§ 43. Joinder of causes of action under Codes and practice acts.

Though a plaintiff may, under Civ. Code, §§ 38 and 126, sue defendants jointly or severally, a claim for damages presented by a counterclaim, for defective work, is not a right of action against either of them separately, but jointly.

Blackwell v. Byrne, 4 Ky. Opin. 410.

Though two distinct causes of action are shown by a petition, one on contract and another in tort, such misjoinder can not be taken advantage of by objection thereto in the answer of defendant; but to be available as an objection, motion to strike out either contract or tort must be made; and this being the statutory mode for excepting to the misjoinder, which having been waived by non-exception in the prescribed mode, constitutes no ground for non-suit.

Lynch v. Reynolds, 2 Ky. Opin. 174.

An action at law on a note and a proceeding in equity for enforcing a lien for securing payment may both be prosecuted at the same time.

Gwith v. Champlin, 3 Ky. Opin. 602.

§ 44.—Forms of action.

A cause of action against one defendant upon an express contract entered into by him alone can not be joined in the same petition with a cause of action arising upon an implied contract with which the other defendant had no connection, since two distinct causes of action can not be united and declared upon in the same petition.

Thornton v. Guthrie, 10 Ky. Opin. 393.

§ 45.—Nature and grounds of action in general.

A creditor whose claim has not been reduced to judgment, may sue on the same, and also to set aside a fraudulent conveyance, in one action.

Wingate v. Garrison, 8 Ky. Opin. 189.

If two notes that are liens on land are both due, they may be declared on in one petition, but they constitute different causes of action.

Deaner v. Storme, 8 Ky. Opin. 56.

Claims arising from injury to person and property may be united in one action.

Paducah Gulf R. Co. v. Adams, 8 Ky. Opin. 100.

Where no objection is made in the circuit court, to the form of the action or to the misjoinder of actions, it is too late to make such objections on appeal.

Ard v. Burton, 8 Ky. Opin. 180.

A suit to enforce the settlement of an administrator's accounts can not be joined with a suit to set aside a deed.

Butt v. Boren, 8 Ky. Opin. 832.

When the plaintiff has a cause of action upon a contract, and also a cause of action for fraud or negligence directly connected with the contract, he may unite them in the same petition.

Gregg v. Woods, 11 Ky. Opin. 424.

Where no objection is made to a misjoinder, but one appears and defends on the merits, he waives his rights to object thereafter.

Maddox's Exrx. v. Williams, 12 Ky. Opin. 466.

§ 46.—Legal and equitable.

A party can not join a cause of action at law against one party with averments constituting an equitable cause of action against him and other parties, and by doing so obtain jurisdiction of the former to try the action at law in a distant county from his home, unless he obtains judgment against the defendants who reside or are summoned in the county where the suit is brought.

Reid v. Cain, 11 Ky. Opin. 269.

§ 50.—Parties and interest involved.

A joint action can not be maintained as against the sureties on a note and the principal on his promise to pay the note after his discharge in bankruptcy.

Craig v. Hudson, Admr., 6 Ky. Opin. 21.

When one sues a corporation and also its officers for wilful neglect, and is required to elect whether he will proceed against the officers or the corporation, this court is not required to decide whether there was error to require plaintiff to elect, where the proof fails to establish any cause of action against either.

Black's Admx. v. Marion County Distillery Co., 12 Ky. Opin. 621.

Tenants in common or joint tenants claiming under the same title and dependent on the same questions to establish their rights to the land can maintain an action against several defendants jointly, although each claim and hold separate parcels and have no joint possession, and persons holding separately may be sued jointly where not in possession but claiming from the same source separate interests against the common title and possession of the plaintiff.

Kincaid v. Magowan, 12 Ky. Opin. 673.

§ 54. Consolidation of actions.**§ 55.—In general.**

The consolidation of several causes of action authorizes the court to consider all the testimony that is competent in either case.

Groom v. Oldham & Ellison, 6 Ky. Opin. 480.

Where causes are consolidated without objection, the evidence taken be-

fore may be used on the trial of the consolidated case.

Pratt v. Samuels, 1 Ky. Opin. 516.

Where a consent order was made in consolidated cases in the following words: "It is agreed among the parties hereto, that the evidence now in the case, and that may hereafter be taken, may be read, and made to apply in each of these consolidated cases;" by such order all the evidence in each and all the cases was before the court, and should have been considered by the chancellor in each case.

Connecticut Bank v. Greer, 2 Ky. Opin. 146.

Several suits growing out of and connected with the same subject-matter should be consolidated, and settled in one suit.

Smith v. Jackson, 2 Ky. Opin. 354.

Two cases relating to a new road to and from the same point, or so adjacent to each other as to require the opening of one road only, may be consolidated and heard together.

Mitchell v. Baker, 7 Ky. Opin. 24.

Where a party to one suit has no interest in another suit in the same court to which his adversary is a party, the trial court should refuse to order such suits consolidated.

Byrd v. Kincaid, 11 Ky. Opin. 314.

Even when no formal order is made consolidating pending causes, if they are treated as consolidated and tried as one action without objection they will be treated by this court as consolidated.

Kelsey v. Long, 13 Ky. Opin. 1121.

§ 57.—Actions which may be consolidated.

A party can not complain that his action for forcible entry and detainer was consolidated with his suit to reform his patent to the land.

Johnson & Scott v. Means, 6 Ky. Opin. 221.

§ 59.—Operation and effect.

When a number of actions between two parties have been consolidated, the judgment in the consolidated cause will be treated as if there was but one

action or one petition containing several counts.

Greene v. Southworth, 11 Ky. Opin. 82.

Where cases are brought and afterwards consolidated by order of the court, they should be heard together as one case, whether the liens sought to be enforced in the various suits were prior or subsequent, and there can not be judgment on one claim and property ordered sold to pay it and no judgment entered on the other claims consolidated with it.

Adkins v. Glazebrook, Grinstead & Co., 12 Ky. Opin. 144.

IV. COMMENCEMENT, PROSECUTION AND TERMINATION.

§ 63. Delay in commencing.

In bringing a suit, one is only required to use that degree of diligence that one of ordinary prudence would have exercised under the same circumstances, and where process was placed in the hands of the sheriff for service nineteen days before the beginning of a session of court and the defendant lived only six or seven miles from the county seat, such plaintiff can not be charged with a lack of diligence in beginning the action.

Jones v. Cozatt, 9 Ky. Opin. 70.

§ 64. Proceedings constituting commencement.

A suit can be commenced in no other way than by filing a petition in the office of the clerk of the proper court and causing a summons to be issued thereon.

Talbott v. Phillips & Scally, 5 Ky. Opin. 401.

§ 70. Abandonment.

Although a trial did not occur for several years after a motion was made to recover upon a claimant's bond, still as long as the case was kept upon the docket, it could not be considered abandoned until an order of court was made to that effect.

Combs v. Wallace, 11 Ky. Opin. 338.

ADEMPTION.

See Wills, § 763.

ADMINISTRATORS.

See Executors and Administrators.
 Action of devastavit against, see Executors and Administrators, § 117.
 Action on administrator's bond, see Executors and Administrators, § 537.
 Care required of, see Executors and Administrators, § 118.
 Chargeable with uncollected claims, see Executors and Administrators, § 120.
 Claim of, see Executors and Administrators, § 486.
 Conditions precedent to suit against, see Executors and Administrators, § 431.
 Conveyances under order of court, see Executors and Administrators, § 414.
 De bonis non—Collection of assets, see Executors and Administrators, § 83.
 De bonis non—When not chargeable with fee bills, see Executors and Administrators, § 120.
 Foreign administrator, see Executors and Administrators, § 517.
 Liability for loss of estate, see Executors and Administrators, § 118.
 Not liable for taxes on deceased's real estate, see Executors and Administrators, § 212.
 Settlement of accounts as between each other, see Executors and Administrators, § 455.
 When necessary party to action, see Parties, § 28.
 When not chargeable with fee bills, see Executors and Administrators, §§ 86, 87.
 When not entitled to commission, see Executors and Administrators, § 495.
 When payment to is payment to heirs, see Payment, § 5.

ADMINISTRATORS DE BONIS NON.

See Executors and Administrators, § 37.
 Failure to file inventory, see Executors and Administrators, § 62.

ADMIRALTY.

IV. PLEADINGS, PETITIONS AND MOTIONS.
 § 59. Allegations in general.
 § 61. Answer.

Liability of master of boat, see Trespass, § 31.
 Submission to jury question of damages to boat moored to wharf, see Wharves, § 20.

IV. PLEADINGS, PETITIONS AND MOTIONS.

§ 59. Allegations in general.

Where the material averment of the petition is that the steamer, *R. L. Woodward*, by her captain, at the time being owned by the defendant, bought the supplies of the plaintiff, and the answer states that the defendant has no knowledge or information sufficient to form a belief that the captain of said boat bought any supplies from plaintiff, the answer is not sufficient under § 125 of the Civil Code, as it does not deny that the defendants were the owners of the boat, nor that they controlled it.

Woodward v. F. W. Stimmell & Co., 1 Ky. Opin. 81.

§ 61. Answer.

Where defendant admitted that he was part owner of the steamer in suit and does not deny, as is charged in the bill, that a certain person was clerk or master of the boat, with full authority to purchase supplies and bind the boat and owners, a denial of such facts are necessary to render the answer sufficient.

Woodward v. Kohn, 1 Ky. Opin. 99.

ADMISSION.

See Evidence, VII.
 As estoppel, see Estoppel, § 5.
 As to title, see Evidence, § 230.
 By demurrer, see Pleading, § 214.
 By pleading, see Pleading, §§ 127, 177.
 To prevent continuance, see Continuance, § 33.

ADVANCEMENT.

See Descent and Distribution, III., B, Wills, §§ 745, 757, 758, 762.
 Evidence of, see Descent and Distribution, § 109.
 Intent of donor, see Descent and Distribution, § 98.
 Pleading as defense to action, see Descent and Distribution, §§ 107, 141.
 Power of executrix to make, see Wills, § 689.

Question as to, settled by conveyances, see Wills, § 759.

Surrender of advancement, see Descent and Distribution, § 109.

Value of, see Descent and Distribution, § 112.

Whether loan or advancement, see Descent and Distribution, § 93.

ADVERSE POSSESSION.

I. NATURE AND REQUISITES.

(A) ACQUISITION OF RIGHTS BY PRESCRIPTION IN GENERAL.

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§ 68. Necessity of claim or color of title.

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See Slaves, § 4.

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Defense of title by adverse possession, see Ejectment, § 24.

Possession not adverse as to married women, see Husband and Wife, § 190.

I. NATURE AND REQUISITES.**(A) ACQUISITION OF RIGHTS BY PRESCRIPTION IN GENERAL.****§ 5. Property subject to prescription.**

§ 8.—Property dedicated to or acquired for public use.

One holding possession of real estate under a railroad company which secured it for railroad uses under the right of eminent domain, but abandoned it, can not successfully assert title by adverse possession against the rightful owner.

Samuels v. Sayers, 8 Ky. Opin. 674.

§ 10. Persons entitled to claim by prescription.

An estate in the hands of an executor will not be held adversely to the heirs or devisees of testator, but for the benefit of those who prove successful in the pending litigation over the will.

Lee v. Butts, 4 Ky. Opin. 267.

If A becomes the tenant of B but for a day and then commences to hold adversely with the knowledge of B, B may recover the land by action commenced at any time within fifteen years, without showing any other fact than that A entered as his tenant.

Gresham v. Broughton, 9 Ky. Opin. 14.

While adverse possession of real estate under claim of ownership based on a colorable title may ripen into a good title, one who enters as tenant under another can not hold adversely to the rightful owner.

Ratcliff v. Iron Hill Furnace & Min. Co., 9 Ky. Opin. 345.

A tenant in possession of real estate can not set up a claim to title by reason of such possession, which is had under his landlord, and can not be adverse to him or any one else.

Collier v. Sharpe, 11 Ky. Opin. 764.

Where one enters as the tenant of another and the land is assessed as the property of the heirs of such landlord for a number of years after his death, such a tenant can not be allowed to secure title under such possession, for his possession is not adverse.

Phillips v. Carroll, 12 Ky. Opin. 408.

§ 13. Character and elements of adverse possession in general.

A merely constructive possession of real estate under a grant can not interfere with a senior patent where the party is in possession claiming to the extent of that boundary.

Roe v. Seaton, 10 Ky. Opin. 239.

(B) ACTUAL POSSESSION.**§ 14. Necessity.**

To acquire title by adverse possession, the possession must have been such as to authorize ejectment every day of the alleged possession.

Hopkins v. Stoner, 6 Ky. Opin. 286.

§ 16. Acts of ownership in general.

Where the surface of land is owned by one party and the coal beneath by another, mere possession by the surface owner is not adverse to the owner of the coal, unless there be some right asserted by the surface owner of such a character as to warrant the presumption that it was known or should have been known by those owning the coal.

Herrell v. Porter, 8 Ky. Opin. 265.

§ 17. Use and occupation.

One having no paper title to real estate, if he claims title must rely entirely upon whatever right he may have acquired by actual possession.

Marshall v. Brown, 12 Ky. Opin. 193.

§ 18. Residence.

To constitute adverse possession within the meaning of the laws of champerty it is not necessary to reside on the land, but it is sufficient if the land is controlled or occupied, and acts of possession done upon or in connection with it under a valid claim based upon a deed made in pursuance of a purchase from one who has actual possession.

Woodford v. Young, 12 Ky. Opin. 109.

§ 19. Inclosure.

When a fence is made the line dividing the lands of adjoining landowners, and is recognized as such line continuously for twenty years or more, it settles the boundary between such

lands even if the title papers of one describes land across the fence.

Byersdorfer v. Schultz, 12 Ky. Opin. 631.

§ 20. Improvements.

Where one takes possession of real estate with the avowed purpose of perfecting the title by lapse of time, and, although having no right, he makes pretense of right and occupies the property adversely, building on and improving it, for eighteen or nineteen years, and at any time during that period his attitude was such as to authorize interested parties to bring suit against him and recover the property, if brought within the statute of limitations, and they brought no such action, his title is good and the plea of limitations will be held good.

Fibel v. Richings' Admr., 12 Ky. Opin. 299.

§ 23. Cutting timber.

Where land is within one's described boundaries, another may not claim title thereto by adverse possession, where his actual possession has only continued four or five years, and prior thereto his only acts with reference to it were in going to the land several times and cutting timber on it, since adverse possession to give title must be actually adverse to the world and continue without interruption for at least fifteen years.

Key v. Joyce, 13 Ky. Opin. 850.

§ 25. Possession of agent, tenant, or vendee.

One holding real estate under an executed contract holds adversely to his vendor, and this is as true where the grantor is a married woman as where she is not.

Field v. Klete, 10 Ky. Opin. 360.

Where one owns a body of land made up of several contiguous tracts and places a tenant in possession, by such act it is reasonable to suppose he intends to take and hold by them the possession of all of such tracts.

Bradford v. Southgate, 12 Ky. Opin. 57.

One who claims land as assignee of another must be able to show that his assignor had a valid claim or title, and where he fails to do so but has

possession of the land, his possession is that of the real owner and those claiming under him.

McCowan v. Wickliffe's Exrs., 12 Ky. Opin. 746.

(C) VISIBLE AND NOTORIOUS POSSESSION.

§ 29. Open and visible character of possession.

One in possession, recognizing and acknowledging no landlord, paying no rent, and who by deed disposed of his title, which was undisturbed on the records for 25 years, is held to acquire a good and perfect title by adverse holding.

Myres & Slater v. Sowards, 4 Ky. Opin. 113.

§ 33. Evidence.

A claimant of land under a senior patent, who has been in possession constructively for more than thirty years, is not required to show actual record title in defense of his claim.

Gridley v. Craig, 2 Ky. Opin. 578.

(D) DURATION AND EXCLUSIVE POSSESSION.

§ 34. Necessity.

Title can only be secured by adverse possession, where the claimant under color of title has entered and held the exclusive possession adversely to all the world and uninterruptedly for a period of twenty years.

Parker v. Smith, 13 Ky. Opin. 4.

§ 36. Possession exclusive of others.

As between persons who claim title by adverse possession, the law favors those who have long held undisturbed possession rather than those who are asserting possession for a much shorter duration.

Bolton v. Willis, 6 Ky. Opin. 247.

(E) DURATION AND CONTINUITY OF POSSESSION.

§ 39. Time requisite for acquisition of rights.

The evidence was held insufficient to disturb a possession so ancient and acquiesced in until the natural objects called for have been removed or destroyed by the influence of time.

Scott v. Osenton, 7 Ky. Opin. 267.

Where land is claimed by long occupancy, and the verdict of the jury is founded on that ground alone, the question of documentary evidence of title need not be considered.

Mardis v. Reeder & Klette, 3 Ky. Opin. 605.

Title by adverse possession is sufficiently shown by proof of actual possession by a party and its vendor continuously for more than 20 years.

Arnold v. Hall, 4 Ky. Opin. 579.

A continued adverse holding for fifteen years against the party claiming, when not laboring under any disability, will bar recovery in an action for real estate.

Joyce v. Monk, 4 Ky. Opin. 687.

§ 40.—In general.

When a testator disposes of his personal property, making no disposition of his realty, but does provide that his executor shall sell the same at the death of his widow and distribute the proceeds among his children, and his children of full age convey the real estate, for a fair consideration, to a purchaser who takes possession and holds it adversely to all the world for more than thirty years, his title is good; and the statute of limitations also is a bar to an action to recover the land from him.

Vandergrift v. Cox, 8 Ky. Opin. 334.

Where one has been in the undisturbed possession of real estate by actual inclosure for more than fifteen years prior to the beginning of an action against him for such land, claiming it as his own, his title can not be defeated.

Maye v. Clark, 8 Ky. Opin. 679.

Where one entered into possession of real estate in 1836, and has held the possession since that time, claiming it as his own, the verdict should have been for him as his title is good.

Walker v. Walker, 11 Ky. Opin. 809.

An action to recover real estate will fail when the proof shows that the defendant and those under him whom he claims have been in possession claiming the property in controversy for over twenty years, and his pos-

session has been open and notorious, with the claim of ownership made and recognized during all those years.

Baker v. Gilbert, 11 Ky. Opin. 912.

After a possession and claim for nearly sixty years, the court will not disturb the claimant on account of the fact that the corners and boundaries of certain patents may omit or fail to include the land of the party in possession, and especially when practical surveyors had been making surveys and no discovery of vacant land had been made.

Gaswell v. Thomas, 12 Ky. Opin. 236.

No claim of title to real estate or liens thereon ought to be enforced against bona-fide purchasers without actual notice, after the lapse of more than twenty-eight years; while as between the vendor and the vendee the lien might have been enforced, it is too late to ask the chancellor after the lapse of twenty-eight years to enforce it against purchasers without actual notice.

Smith & Nixon v. Myers' Admr., 12 Ky. Opin. 352.

Adverse possession will not ripen into title when it is only shown to have been held for eleven years.

Cheny v. Smith, 13 Ky. Opin. 651.

Where adverse possession of real estate is relied upon to give title, it must be shown that the claimant actually claimed the real estate in dispute as his own as against all persons, and that his claim has been continuously asserted for at least fifteen years, during all of which time he or his grantors have been in possession.

Ryan v. Kanella, 13 Ky. Opin. 740.

§ 41.—Under claim or color of title.

Where one purchases land at an execution sale and receives a deed from the officer regularly executed and recorded, and thereafter occupies and claims the land as his own for more than fifteen years, it is clear that his holding is adverse and the statute of limitations applies and is conclusive, and his title is good.

Gresham v. Gresham, 11 Ky. Opin. 547.

Where one holds adverse possession of real estate under a conveyance to him, uninterruptedly for nearly twenty-five years, and tracing the title of record back shows connected paper title for more than sixty years, he has a good title.

Beard v. Hudnall, 11 Ky. Opin. 653.

Where one secures possession of land under a conveyance and holds the possession under an undisputed claim of ownership, acquiesced in by everyone for more than fifty years, it is too late for one to assert a title to it under conflicting proof as to the manner in which the person so long in possession obtained his title between the years 1831 and 1840.

Beatty v. McGuire, 12 Ky. Opin. 34.

Where possession of land under a deed and claim of ownership is taken and held by the owner or his tenants under him, continuously for fifteen years or more, his title is good and he can not be deprived of it.

Bradford v. Southgate, 12 Ky. Opin. 57.

Where one is in possession of land under a deed from an officer of the state who had sold it, and is asserting a claim in his own right, and has had such possession almost long enough to bar its recovery from him, and some of those interested in the land disclaim this interest, or fail or decline to assert their claim as against him, such person, if living, or his heirs where he is dead, is entitled to such disclaimed or unasserted interests.

Lingenfelter v. Carlisle's Admr., 12 Ky. Opin. 83.

One who receives a deed to real estate in November, 1859, enters into possession at that time and has held it uninterruptedly and adversely to the whole world from that time to January, 1875, a period of more than fifteen years, has a good title.

Collier v. Davis, 12 Ky. Opin. 100.

In order that one claiming title may be entitled to a presumptive occupancy to the extent of the claimed boundary, he must enter and occupy

under the belief that his title is good, and under the law requiring the order of the county court for the location, the survey, the entry and patent, it must be presumed that the defendant knew that the patent obtained by him was within the patent boundary of a former patent, and thus he can not claim to hold under color of title.

Davidson v. Combs, 12 Ky. Opin. 512.

Where the holder of the record title to real estate and those under whom he claims have had the adverse possession of the land, claiming it under deeds duly recorded for more than thirty years, his title is good.

Poor v. Leavell, 12 Ky. Opin. 545.

While open adverse possession of real estate under color of title for fifteen years will give good title, one claiming title under such adverse possession must be able to show satisfactorily that such land has been uninterruptedly in his possession during such time.

Warmoth v. Tobin, 13 Ky. Opin. 230.

§ 42. Beginning of adverse possession.

Although a party's entry on land may have been tortious and wrongful from the beginning, yet if he entered under a deed regularly put on record and continued to assert ownership thereunder, the Statute of Limitations began to run from the date of such entry.

Meyers v. Forstman, 6 Ky. Opin. 94.

Where the evidence clearly shows that after recovery in a prior action defendants and their ancestors were in possession of the land by their tenants before plaintiff entered, and that plaintiff's entry was without right and fraudulent, a judgment for defendants will be sustained where plaintiff failed to make out his case.

Daniel v. Cassell, 4 Ky. Opin. 544.

§ 43. Tacking successive possessions.

Where it is shown by a party that he and his grantors have been in actual and in continuous possession of real estate under claim of title for more than twenty years, and that the commonwealth has granted its title,

such party can not be disturbed, but has acquired the legal title.

Oldham v. Taylor, 9 Ky. Opin. 274.

Where a deed was executed in 1839, and the vendee and the successive vendees have been in possession under it for a period of over forty years, it is too late after such a lapse of time to successfully assert a claim of right under some other claim of title.

Bronston v. Davidson's Trustee, 11 Ky. Opin. 672.

Where real estate is purchased by a husband and paid for by his wife, and the husband died in 1858, and from that date, as well as before, the widow claimed the absolute ownership of the property and was in the absolute and exclusive possession of it uninterruptedly under such claim, and made valuable and lasting improvements on it, and continued to so claim such ownership until her death in 1874, which was more than fifteen years after her husband's death, her title by adverse possession was good and could not be disturbed by the claims of her husband's heirs.

Yeatman v. McDonald, 11 Ky. Opin. 749.

Where land was patented to A in 1839, and in the year 1852 J, claiming under the patent, entered on the land and sold it to C, who as early as 1854 cultivated and fenced it, had the boundaries marked and sold and conveyed it to J, in 1866, who has held it by herself and tenants ever since that time until suit entered against her in 1885, J has a good title by adverse possession and will not be disturbed therein.

Timmons v. Hanks, 13 Ky. Opin. 562.

§ 44. Continuity in general.

Where there was a continuous adverse possession of land by an actual settler from 1856, except at one time for a short period no one was in the house, but the evidence does not show that the possession was abandoned, and at the time appellant attempted to appropriate the land it was possessed by one claiming under the actual settler, title by adverse possession is established.

Bryan v. Meredith, 6 Ky. Opin. 35.

The possession of the whole tract is not interrupted by a decree of court, nor converted into a friendly holding, and such possession for twenty years will bar a right of recovery.

Sturgeon v. Conn, 2 Ky. Opin. 647.

Where A. sold lands to B., agreeing to make a conveyance of same, and B. entered into possession, and later filed suit against A. for an exhibit of title, alleging that he had paid for the land and demanding a deed of conveyance, suggesting that A. could not make a valid deed on account of certain incumbrances, and A. answered, setting out a continuous thirty years' title through heirs who had obtained the land from a commissioners' sale of a dower interest and delivered to and tendered through the court a deed or conveyance; a continuous occupancy and possession of the land for thirty years will constitute perfect title, and B. should accept the deed as tendered.

Nave v. Letcher, 1 Ky. Opin. 480.

One who purchases and receives a conveyance of land and holds its possession continuously for more than forty years can not be dispossessed by one claiming to have purchased it from his grantor many years after the first purchase.

Duggins v. Burdett, 13 Ky. Opin. 454.

§ 46. Interruption of possession.

§ 48.—By third persons.

Where the real holder of title conveys it to another who knows that one in possession is asserting a claim, he takes the title subject to any defense such claimant may have.

Haskead v. Mallory, 8 Ky. Opin. 53.

(F) HOSTILE CHARACTER OF POSSESSION.

§ 58. Necessity.

One can not acquire title to a spring from the mere use of it by permission of the owner.

Benningfield v. Luchett, 13 Ky. Opin. 577.

§ 59. Possession consistent with that of another, and possession becoming adverse after amicable entry.

Where one entered on the land in

controversy, under the will of her father, and she and those claiming under her continued thus to hold and claim the land adverse to the devisees of the father for more than fifteen years, such holding and claim authorizes the presumption of notice to her co-devisees, under the will of the father, of her manner of holding.

Feland v. Route, 3 Ky. Opin. 80.

§ 61.—By persons in fiduciary relations.

Where the wife acquires title and possession of real estate, the fact that she was married did not vest the husband with any possession that could ripen into title in himself adverse to the claim of the wife.

Overly v. Curry, 8 Ky. Opin. 282.

A person having entered into possession of real estate by virtue of his wife's title can not assert adverse possession as against his wife or her heirs.

Flynn v. Carroll, 8 Ky. Opin. 656.

§ 62.—By or against heirs, devisees, or surviving husband or wife, or their grantees.

Long continued possession and control of real estate is not enough to overcome the legal presumption that one holds according to his title, and in order to make his holding adverse to the other heirs who had undivided interests it was necessary not only that his possession should be open and notorious, but he must show that his co-heirs had actual knowledge that he was claiming against them, or such facts from which it would be inferred that they had such knowledge.

Hiser v. Thompson, 9 Ky. Opin. 627.

§ 63.—By vendor or purchaser.

A possession is not adverse where the person holding it looks for title to another under whom he holds.

Hashead v. Mallory, 8 Ky. Opin. 53.

§ 66. Extension of possession to boundaries or fences.

Evidence of the occupancy of a tract of land overlapping on an adjoining tract, for more than twenty years, is sufficient to constitute title by adverse possession.

Norcum v. Shivil, 4 Ky. Opin. 220.

One who had actual possession of the land in controversy, openly using and claiming it as his own for the requisite time to make the statute of limitation a bar, as in ordinary cases of continuous, adverse possession, the fact that he placed his enclosure beyond the true line, by mistake, could not affect his right to rely on the statutory bar.

Steers v. Yorke, 4 Ky. Opin. 514.

§ 68. Necessity of claim or color of title.

The possession and occupancy of lands under color of title, will give no rights thereunder to the holder of the premises, where the title thus asserted is procured by a fraudulent transfer.

Vanade v. Hass, 2 Ky. Opin. 342.

In order to show adverse possession of real estate, it must be made to appear that the person claiming to be possessed had in fact the possession manifested by some act or fact sufficient to indicate to others that fact; and there must be some open demonstration of actual occupancy, or at least of intended use, whereby the person bargaining for it may have the means of ascertaining that it is in the adverse possession of another.

Leiber v. Haggerty, 8 Ky. Opin. 136.

§ 69. Validity and sufficiency of title or claim.

When land is sold under a defective power of attorney, and the vendor acquiesces in the transaction for more than fifteen years, during all of which time the vendee has had the actual possession, the Statute of Limitation presents a complete bar.

Collier v. Patrick, 4 Ky. Opin. 284.

§ 70.—In general.

One can not recover title on a possessory claim as against one who at the date of the beginning of the action was in and had been in the actual possession of the land, claiming it as his own for more than forty years, but the plaintiff in such an action must show his own title before he can recover.

Webber v. Gibson, 13 Ky. Opin. 603.

§ 73.—Patents, grants, certificates, surveys and plats.

Where a patent to real estate was given in 1794, and there has been no possession or well established boundary under such patent, and one takes actual possession under a patent to him dated in 1852, and holds the same under a claim of title, and holds possession adversely and continuously for more than twenty years, he can not be dispossessed by one claiming ownership under the older patent.

Carter v. Wootman, 9 Ky. Opin. 393.

Where in a suit to recover real estate it is shown that the land claimed by the plaintiff is within a prior patent boundary under which he claims, the defense must fail unless it appears that no entry or possession was had by plaintiff and those under whom he claims within such patent boundary; but where it does appear that no such entry was made the defendant may have acquired title by a continuous adverse holding for fifteen years before the bringing of the action.

Hendrix v. Buckner, 10 Ky. Opin. 923.

II. OPERATION AND EFFECT.

(A) EXTENT OF POSSESSION.

§ 96. Property in actual possession.

One who claims title to real estate by adverse possession can only claim the tracts of land in his actual control and possession; that which he and his grantors have inclosed and held adversely to all the world.

Warmoth v. Fitch, 13 Ky. Opin. 307.

Where a plaintiff, in his petition charges a defendant with trespass, and the land on which the alleged trespass was committed is included in a large survey theretofore patented, and neither of the parties have any other claim to it, except what is derived from actual possession, not held long enough to ripen into a title by limitation, the right to recover depends on whether plaintiff had possession of the land on which the defendant built his cabin and cut timber, and if there was

another claimant in possession of the land lying between that occupied by plaintiff and defendant it would show that the land in possession of defendant was not subject to plaintiff's claim.

Vanmeter v. Hays, 13 Ky. Opin. 489.

§ 98. Possession under claim of right without color of title.

Where neither litigant shows documentary evidence of title derived from the government, a constructive possession will prevail over a claimant who had not the property under inclosure.

Peak v. Hayden, 4 Ky. Opin. 248.

§ 99. Possession under color of title.

Where there is no actual adverse possession, an actual possession by the occupant is constructively co-extensive with the defined limits of his claim of possession.

Kelly v. Kelly, 1 Ky. Opin. 328.

Where the land in controversy contains five acres, which is covered by a patent for 2,000 acres to Levin Powell, under whom both parties claim title, and which lands the deeds of both parties cover; and appellant claimed under the older deed from the patentee, and he and those under whom he claimed took possession of and resided on this tract of land outside of the interference prior to the entry of appellee and his vendors on the other tract, claiming to be possessed to the extent of the boundary of his deed and with the intention of taking possession of the whole tract, including the part within the interference, which was, until a few years past, woodland and unenclosed, such entry upon the part of the appellant and his vendors vested him with the possession to the full extent of the boundary of his deed, and the subsequent entry of the appellee and his vendors on the other tract did not divest him of his possession.

Lockery v. O'Donnell, 1 Ky. Opin. 156.

Where M. and those under him, having the elder grant, were in the constructive possession to the boundary of his grant, when appellees' vendor entered, their entry only operated to oust the grantee of the elder patent of the land within the interference to

the extent of the actual entry and enclosure.

Surratt v. Donaldson, 3 Ky. Opin. 576.

Where the evidence shows that a survey was made of a portion of lands, held under a prior patent, possession taken and entry made, it constitutes an adverse holding which cannot be defeated.

James v. Kuykendall, 4 Ky. Opin. 502.

The entry on land under a junior patent, outside of the interference, does not give the person so entering possession of any part of the land within the interference.

Snider v. Ranchubush, 5 Ky. Opin. 148.

Where a party claiming land by adverse possession claims to have entered under a patent which is absolutely void, the patent cannot have any force except to show the extent of possession claimed under it.

Meyers v. Forstman, 6 Ky. Opin. 94.

Where defendant acquired the conveyance of land by plaintiff while plaintiff was an infant, defendant's uninterrupted possession of the land for more than 20 years before institution of suit by plaintiff to recover the land gives the defendant a good title thereto.

Johnson v. United Society of Shakers, 6 Ky. Opin. 139.

Where a party lives on land and holds under an older and superior grant, claiming the whole of the land, he is constructively possessed to the extent of his boundary, and cannot be ousted of any part thereof except by actual entry and enclosure within his boundary; but, where a party lives on land claiming under a junior patent, he may be ousted by one holding under the older grant, without the actual enclosure.

Poplar Mountain Coal Co. v. Dick, 7 Ky. Opin. 420.

Where one claimed more land than his deed called for, and his fence extended beyond the boundary, his mere declaration, after his possession had ripened into title, that he would reset

his fence and put it on the line, is not binding on him.

Scott v. Osenton, 7 Ky. Opin. 267.

Where one claiming land under a patent to his grantors, or those under whom he claims, has had the actual continuous possession of the tracts for fifteen years, claiming to the boundary as described by the patent or original survey his title is good.

Lewis v. Cox, 13 Ky. Opin. 447.

§ 100.—Constructive possession in general.

One can not extend his possession over land not adjoining his lands, by construction.

Stoner v. Talliaferro, 9 Ky. Opin. 90.

§ 101.—Relation to each other of different premises or parts of same premises.

A good title to lands may be established by adverse possession, through the acts of an agent of a patentee, and although such agent was appointed to sell the lands only, those holding under and by virtue of leases made by said agent have a right to recognize such agency and claim the benefit thereof.

Blanchet v. Musselman, 1 Ky. Opin. 569.

The possession of land under an older patent constructively puts the party in possession, up to the patent boundaries, which constructive possession can not subsequently be ousted under a junior patent only by actual enclosed possession.

Gridley v. Craig, 2 Ky. Opin. 578.

Without conflicting occupancy, the long possession by residence under an elder grant, claiming possession and use co-extensive with the entire boundary of a patent, is constructively actual and adverse possession to the same extent.

Devaxhier v. Buford, 2 Ky. Opin. 612.

The adverse holding of personal property for a period of five years gives a perfect legal title.

Ritchey's Admr v. Sanders, 2 Ky. Opin. 66.

§ 103.—Mixed possession under hostile titles, or conflicting grants or surveys.

An entry by a junior patentee into the boundary and possession of the elder patent amounts to possession only to the extent of his enclosure.

Camerson v. Beatty, 13 Ky. Opin. 242.

(B) TITLE OR RIGHT ACQUIRED.

106. Nature and extent of title or right.

Twenty years' uninterrupted adverse possession gives the holder a perfect legal title.

York v. Doyle, 1 Ky. Opin. 212.

Though a decree of court may limit the legal title to land to only one-half a designated amount, one in possession of the whole tract for a continuous period of more than twenty years by a hostile holding, including the time of the litigations thus stated, will be held to have a good title by adverse possession.

Sturgeon v. Conn, 2 Ky. Opin. 647.

Where one purchases land and goes into possession up to a certain boundary, and he and his grantees hold possession for thirty or more years, it is then too late for the heirs or grantees of the vendor to assert a claim beyond such recognized boundary line.

Beal v. Arnold, 10 Ky. Opin. 351.

A dedication of land for the use and benefit of a religious society may be made by parol, and where it is so dedicated and not formally conveyed, but is occupied and possessed and used by a church adversely to all others from 1853 to 1879, such church has good title thereto, and persons seceding therefrom and organizing another church society can not secure a paramount title thereto by procuring a conveyance from those holding the record title, since such a deed will be canceled at the suit of the organization to whom the land was dedicated.

Hollar v. Harney, 12 Ky. Opin. 140.

§ 107. Amount of land.

Where A enters and takes posses-

sion of a well defined boundary and continues to reside within the boundary, claiming to the extent of same for more than fifteen years, it bars the recovery of B, who asserts title thereto; but if B first entered, his possession extending to his patent boundary, and A thereafter enters, he will be confined to his actual inclosure.

Harlan v. Howard, 13 Ky. Opin. 470.

III. PLEADING, EVIDENCE, TRIAL AND REVIEW.

§ 110. Pleading possession.

In a suit to quiet title, a pleading is but a legal conclusion where it avers only "that the plaintiff and those under whom he claims have been in the possession of the land peaceably and uninterruptedly, claiming it as their own, for such a length of time that his title has been sanctified and perfected."

Davidson v. Dickerson, 9 Ky. Opin. 495.

§ 112. Presumptions and burden of proof.

Possession is prima facie evidence of title, and one who asserts title against one in possession has the burden of showing title in himself.

Ratcliff v. Iron Hill Furnace & Min. Co., 9 Ky. Opin. 345.

§ 113. Admissibility of evidence.

A will otherwise inoperative is competent to prove how the devisee held title, and that his holding was in his own right and adverse to the world.

Stegal v. Brooke, 2 Ky. Opin. 193.

Deeds and title papers may be read as evidence to show the extent of possession, although they convey no legal title.

Lockery v. O'Donnell, 1 Ky. Opin. 156.

§ 116. Instructions.

An instruction relating to adverse possession, that if the jury believe from the evidence that when O entered the land he entered claiming to be owner of the whole tract, repudiating title in others to any part of the land, and that he and those claiming under him had been in continuous

and adverse possession of the land for more than fifteen years before the commencement of the action, O acquired title by adverse possession, is a correct statement of the law.

Starkie v. Ogden, 7 Ky. Opin. 105.

The court properly instructed that if the jury believe from the evidence that when O. entered upon the land, he recognized the title of appellants' vendor, but afterwards claimed the whole tract by open and notorious acts clearly indicating a holding hostile to the claim of appellants, and that of their vendor, and that O. and those under him continued to claim and hold the land as their own adverse to all others for more than 15 years before the commencement of the action, O. acquired title by adverse possession.

Starkie v. Ogden, 7 Ky. Opin. 105.

ADVERTISEMENT.

Of sale by court commissioner, see Court Commissioners, § 4.

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See Attachment III, B; Receivers, § 38.

Amendment of affidavit in garnishment, see Garnishment, § 86.

As evidence, see Evidence, § 353.

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Sustaining or impeaching verdict, see Trial, § 344.

Waiver of defect in, see Pleading, § 404.

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Exemption of agricultural land from municipal taxation, see Municipal Corporations, § 967.

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Conversion of property, see Trover and Conversion, § 5.

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ALIMONY.

Allowance of, see Divorce V.

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ALTERATION OF INSTRUMENTS.

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§ 2.—Nature and extent of change in general.

§ 3.—Parties.

§ 5.—Subject-matter.

§ 11. Persons making alteration, and intent.

§ 12. Authority or consent of parties.

§ 15. Effect upon rights of parties.

§ 20.—Negotiable instruments.

§ 26. Evidence.

§ 27.—Presumptions and burden of proof.

§ 1. Materiality.

§ 2.—Nature and extent of change in general.

When a note is executed by several persons and afterwards by consent of the holder and one of the makers it is altered as to the rate of interest it is to draw, the alteration is a material one and will operate to discharge the other obligors from all liability upon it.

Gaines v. Scott, 11 Ky. Opin. 361.

The changing of a note after execution and delivery, by inserting in the body thereof the words "to bear interest from date" is a material alteration.

Phelps v. Nesbitt, 6 Ky. Opin. 181.

§ 3.—Parties.

Where a bill, after being drawn and accepted and while in the hands of the holder, was so altered, without the drawer's knowledge or consent, as to substitute another as drawer, it was a material alteration such as will relieve the original drawer from liability thereon.

Woollums v. Murray, 6 Ky. Opin. 262.

§ 5.—Subject-matter.

An insertion in a deed, by the grantor, of the words "that there should be no lane running from the creek between us," did not affect any right of the grantee, where the contract of purchase does not call for such lane, and it does not appear that the grantee ever enjoyed the use of the lane at such place.

Miller v. Sutton, 6 Ky. Opin. 86.

Where a memorandum is made at the bottom of a note by one of the makers, below the signatures that "interest on this note 10 per cent." it is not an alteration of the note, and is no part of the note and the holder is entitled to recover the amount of said note according to the stipulations made in the body thereof, the added words being no part of said note.

Jones v. Alexander, 8 Ky. Opin. 816.

§ 11. Persons making alteration, and intent.

Where a contract placed in the hands of a third person and delivered to the obligee, was, before delivery to the obligee, materially altered by erasing certain portions without the knowledge or consent of the obligors, such alteration operated as the release of the obligors.

Cooper & Burns v. Pennington, 7 Ky. Opin. 660.

§ 12. Authority or consent of parties.

The principal of a note and the payee thereof do not have the right

to change the note without the consent of the surety, although the effect of the change might be to the interest of the surety.

Fannin v. Steele, 6 Ky. Opin. 130.

After a note has been executed and delivered, one party can not without the consent of the other, change the note to conform to the contract between them.

Phelps v. Nesbitt, 6 Ky. Opin. 181.

§ 15. Effect upon rights of parties.

§ 20.—Negotiable Instruments.

Adding the words "interest from date" to a note after signature and delivery, and without the knowledge or authority of the maker, constitutes such an alteration as will release the maker from the whole amount of the debt.

Richards v. Cofer, 2 Ky. Opin. 55.

§ 26. Evidence.

§ 27.—Presumptions and burden of proof.

Where the paper sued upon shows on its face that the name of a person, apparently an obligor, has been endorsed, the alteration, if made by the holder, released the obligor, and the burden is on the holders of the paper to explain the erasure or mutilation.

Perry v. Bloom, 9 Ky. Opin. 582.

ALTERNATIVE PLEADING.

See Pleading, § 20.

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See Indictment and Information VIII; Pleading VI.

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Affidavit in garnishment, see Garnishment, § 86.

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Of answer, see Pleading, § 255.

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Of articles of incorporation, see Corporation, § 40.

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Actions for injuries to animals, see Railroads, § 433.

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Care as to animals seen on or near railroad track, see Railroads, § 419.

Care to be exercised by owner of animals, see Railroads, § 420.

Injuries to, see Railroads X, H.

Liability for frightening animals, see Railroads, § 360.

§ 26. Evidence.

Evidence conducing to show that a note has been so altered as to make it payable to S. M. instead of I. L., is competent under the charge of fraud.

Richardson v. Arrowsmith, 6 Ky. Opin. 427.

Where it is apparent upon the face of a note that it has been changed since its execution, it will be presumed that the alteration was made without the consent of the obligor, and the burden of proof is on the holder to establish the fact that it was made by the obligator or with his consent.

Snider v. Ranchnbush, 5 Ky. Opin. 148.

§ 43. Injuring or killing animals in general.

§ 44.—Civil liability.

Where a city ordinance, in its penal provisions, provides that dogs unmuzzled may be killed, but the language of the ordinance is such as to apply only to the dogs of persons in said city, and does not in terms apply to non-resident owners, the city will be liable to such non-resident owners whose dogs are killed by city officers under such ordinance.

City of Paducah v. Craig, 8 Ky. Opin. 358.

§ 47. Running at large.

§ 57.—Criminal prosecutions.

Whether a field of another is inclosed by a lawful fence or not, the owner of cattle can not turn them into it for the sake of gain or to injure the property without rendering himself amenable to the punishment

provided by Gen. Stat. (1879), ch. 29, art. 28.

Ellis v. Commonwealth, 11 Ky. Opin. 233.

§ 66. Personal injuries.

§ 68.—Dogs.

A city is not liable for damages caused by a vicious dog owned by a citizen, on account of such city having, for a license fee paid to it by the owner, permitted him to keep the dog, since such a license will not render the city liable and protect the owner from liability.

Lewis v. City of Louisville, 12 Ky. Opin. 686.

§ 70.—Knowledge or notice of vicious propensities.

Even where servants and agents engaged in driving a cow along a highway did not know of her viciousness, but such animal, on reaching the streets of a town, attacked persons on the street long before it reached the place where plaintiff was injured by her, such agents in the exercise of ordinary prudence should have secured the cow by some means so as to prevent any attempt to injure others; and where they neglect to do so, but persist in driving her along a street with the knowledge of her enraged condition and she attacked and injured a person, her owner is liable for the damages caused by such injury.

Villierre v. Payne, 11 Ky. Opin. 70.

§ 77. Injuries to other animals.

In an action for damages for sheep killed by dogs, the petition must allege that the owner of the dogs had received the notice required by the statute, or that his dogs had killed and wounded sheep before.

Donnell v. Knox, 4 Ky. Opin. 190.

§ 78.—Duties of owners in general.

The owner of a vicious horse is required to so confine him as to prevent him from injuring the stock of others; but where the owner is not aware of the vicious habits of his horse he is only bound to use such means as an ordinarily prudent man would have used in order to have kept a horse of like temper within his own inclo-

sure, in order to have prevented him from injuring the property of others. *Abshear v. Monday*, 10 Ky. Opin. 88.

§ 89. Trespassing.

§ 100.—Actions and other proceedings for damages.

It is not sufficient to aver in a petition for damages done by trespassing cattle, merely that plaintiff has kept up a good and lawful fence on his portion of a partition fence, but he should aver that he has continuously maintained such fence.

Mitcheson v. Norse, 9 Ky. Opin. 683.

ANSWER.

See Pleading III, A, C.

Action of ejectment, see Ejectment, §§ 68, 69.

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Amendment, see Pleading, § 255.

As estoppel, see Estoppel, § 68.

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To action on note, see Bills and Notes, §§ 472, 474.

To petition for foreclosure of mortgage, see Mortgages, § 454.

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Reversal of judgment against county, see Counties, § 227.

I. NATURE AND FORM OF REMEDY.

§ 3. Proper mode of review.

Where the defendant excepted to the decision of the court, and appeared and filed exceptions to the commissioner's report of sale she thereby made herself a party to the suit, and her remedy for any supposed wrong is by appeal.

Cravens v. Gray, 6 Ky. Opin. 472.

An appeal to the circuit court operates as a merger of the judgment and is an original suit in that court as long as prosecuted; yet its voluntary discontinuance by plaintiff leaves the judgment in as full force as it was before the appeal suspended its validity.

Wallingford v. Dayle, 1 Ky. Opin. 213.

The construction given to § 579 of the Civil Code is that when the error complained of appears in the record and also the fact that the defendant is an infant or lunatic, etc., the remedy is by an appeal and not by petition to vacate the judgment.

Dollins v. Perry, 5 Ky. Opin. 763.

§ 14. Successive and cross-appeals or other proceedings.

Cross-appeals can not be granted between co-appellees.

Thompson v. McAfee, Ex'r, 7 Ky. Opin. 28.

Where a sale and transfer of goods is made by a conveyance binding on the transferrer, no complaint can be

made on cross-appeal of that not injurious to such party.

Schloss & Gritz v. O'Hara, 1 Ky. Opin. 395.

A party has no right to a cross-appeal where there has been no appeal from the judgment in his favor.

Stegal v. Brooke, 2 Ky. Opin. 193.

One appellee can not prosecute a cross-appeal against another, and the attempted cross-appeal will be dismissed.

Bannings v. Hays, 9 Ky. Opin. 265.

A cross-appeal can only be prosecuted by an appellee against an appellant, as appellees can not prosecute cross-appeals against each other.

Minor v. Withers, 9 Ky. Opin. 512.

II. NATURE AND GROUNDS OF APPELLATE JURISDICTION

§ 20. Jurisdiction of lower court.

Where plaintiff's petition does not show jurisdiction in the circuit court, he can not be allowed, in the Court of Appeals, to take advantage of the insufficiency of the plea on which the defense is based.

Turpin v. Hall, 7 Ky. Opin. 403.

Where a court refused to make an order allowing the filing of an answer upon condition that defendant would not object to the jurisdiction of the court to try the case on its merits, but immediately after such ruling there appears in the record the paper, without any showing that the court had reconsidered the motion, or that the order rejecting the same had been set aside, it must be considered that the copy of the paper is improperly in the record and that defendant did not waive his right to object to the jurisdiction of the court.

Peacock v. Turner's Ex'r, 7 Ky. Opin. 488.

§ 23. Determination of questions of jurisdiction in general.

Where, after an appeal has been taken from a judgment, the subsequent setting aside of the judgment on motion, will not affect the appeal.

Deshazer v. Commercial Bank, 7 Ky. Opin. 526.

III. DECISIONS REVIEWABLE.

(A) COURTS AND OTHER TRIBUNALS SUBJECT TO REVIEW.

§ 24. Judicial character of tribunal.

The Court of Appeals has no jurisdiction of an appeal taken directly from the county court, in view of §§ 10, 16, 2 R. S. 407, providing for appeals to the circuit court.

McKinney v. Commonwealth, 6 Ky. Opin. 208.

§ 26. County courts.

Section 20 of the Civil Code does not authorize an appeal from the orders or judgment of a county court relative to the settlements by sheriffs of their accounts as collectors of the county levy; since the county judge acts ministerially, and not as a judicial officer in receiving and approving the settlement, and if he refuses to allow the sheriff the lawful commissions, the remedy against him is by mandamus and not by appeal.

Springfield v. Webster County, 5 Ky. Opin. 108.

Where the statute gives no right of appeal from the county court to the circuit court, an appeal from the latter to the appellate court is erroneous and will be dismissed.

Prewitt v. Commonwealth, 4 Ky. Opin. 104.

In appeals from the county court to the circuit court, in cases for the partition of real estate, under § 837 of the code, in force in 1880, and §§ 20 and 22 of Myers' Code, the jurisdiction of the circuit court is purely appellate, and that court can only pass on such facts as are certified to it from the county court, as it has no power to hear such cause de novo.

Davidson v. Davidson, 10 Ky. Opin. 749.

§ 31. Special tribunals, boards and officers, exercising judicial functions.

Under a sale for taxes, of personal property, no appeal lies under Civ. Code, § 16, where the amount involved is less than the statutory amount.

Boisseau v. Town of Franklin, 4 Ky. Opin. 567.

(B) NATURE OF SUBJECT-MATTER AND CHARACTER OF PARTIES.**§ 41. Nature or form of action or proceeding.**

The Court of Appeals has no jurisdiction of an appeal from a judgment granting a divorce, but it has jurisdiction of an appeal from so much of the judgment as dismissed appellant's petition and denied her petition for alimony.

Graham v. Graham, 8 Ky. Opin. 738.

§ 44. Cases originating in inferior courts.

There can be no appeal from the judgment of the county court rejecting a claim, unless the claim shall first be presented to that court.

Crittenden County v. Conger, 11 Ky. Opin. 485.

(C) AMOUNT OR VALUE IN CONTROVERSY.**§ 45. Cases subject to pecuniary limitations.**

The Court of Appeals has no jurisdiction in cases where the penalty is a fine of fifty dollars or less and no other punishment.

Commonwealth v. Story, 4 Ky. Opin. 627.

§ 46. Requisite amount or value.

Section 16, Civil Code Prac., regulating the jurisdiction of the Court of Appeals, limits the right of a defendant to an appeal from a judgment against him for money or personal property, in cases in which the judgment amounts to \$50.00 or more, except in cases in which the judgment is reduced below \$50.00 by a set-off or counterclaim.

Potter v. Jenkins, 4 Ky. Opin. 266.

§ 47. Amount claimed.

The Court of Appeals has jurisdiction of an appeal when the amount demanded either by the plaintiff or defendant is over fifty dollars.

Baugh v. Reed, 9 Ky. Opin. 522.

§ 49. Amount or value actually involved.

The allowance made to a commissioner by special judge having no jurisdiction, does not come within the general term of costs, and can not be

considered in determining the amount in controversy on appeal.

Steinberger v. Taylor, 5 Ky. Opin. 106.

The Court of Appeals has no jurisdiction of an appeal where there is only \$37 involved.

Hackler v. Nicholson, 12 Ky. Opin. 606.

§ 50.—In general.

The Court of Appeals has no jurisdiction on appeal where the only question presented is the power of the trial court to subject under attachment a debt of \$17.

Parks & Myers v. Casey, 6 Ky. Opin. 484.

Pursuant to the provisions of the Act of 1858, the Court of Appeals has no jurisdiction of an appeal where the amount in controversy, exclusive of costs, is less than fifty dollars.

Adams v. Delcher & Son, 8 Ky. Opin. 583.

Where an appellant was granted an appeal to the appellate court, but the appeal by mistake was made out to the superior court, which had jurisdiction of such appeals, and the superior court struck the appeal from the docket, the appeal may be transferred by order of the Court of Appeals to the superior court, and thereafter the Court of Appeals has no jurisdiction of a motion to dismiss such appeal on the ground that the transcript was not filed twenty days before the second term after the appeal was granted, since the superior court has exclusive jurisdiction over such a motion.

Louisville & N. R. Co. v. Connelly, 12 Ky. Opin. 434.

§ 51.—Effect of set-off or counterclaim.

The amount claimed by appellant and the set-off claimed by appellee can not be added together in order to give the Court of Appeals jurisdiction.

Logan v. Johnson, 7 Ky. Opin. 387.

§ 55. Amount or value of recovery.

The Court of Appeals has jurisdiction on appeal of a judgment for \$42.21 against an assignor of a lease for repairs of the leased premises made by the lessee.

Joplin v. Raddin, 6 Ky. Opin. 661.

Where the only question involved is that the trespass which turned upon the boundary and possession did not involve title to the land, a judgment for \$25 does not give jurisdiction to the Court of Appeals.

Lacy v. Brown, 7 Ky. Opin. 233.

§ 56.—In general.

Since the Act of February 10, 1880, amending Gen. Stat. (1879), ch. 28, art. 22, § 2 (Acts 1879, p. 20), the minimum of this court's jurisdiction of appeals from judgments for money or personal property has been \$100 and since such date this court had no jurisdiction of appeals from judgments of less than one hundred dollars.

Taylor v. Shawley, 11 Ky. Opin. 22.

§ 62. Reduction by amendment or remission.

The remission of \$2.00 from a judgment is not sufficient to deprive the Court of Appeals of jurisdiction, although it left a balance of less than \$50.

Marks v. Schoenfield, 3 Ky. Opin. 582.

(D) FINALITY OF DETERMINATION.

§ 66. Necessity of final determination.

An order of the lower court, adjudging the dismissal of former suits null and void, and that the allegations of the petition for revivor were sufficient to give him jurisdiction, and retaining the cases for further preparation and trial on their merits, is not such a final order, from which an appeal will lie.

Miller v. Funk, 4 Ky. Opin. 224.

A judgment, to be final, must not merely decide that one of the parties is entitled to relief of a final character, but must give them relief by its own force, or be enforceable for that purpose, without further action by the court, or by process for contempt.

Miller v. Funk, 4 Ky. Opin. 224.

§ 67. Interlocutory and intermediate decisions.

The Court of Appeals has no jurisdiction on appeal, where a demurrer to defendant's answer was overruled, and on final hearing, after the evidence was heard, the court refused to permit

plaintiff to proceed further, and refused a prayer for judgment, but plaintiff's petition was not dismissed nor final order or judgment rendered.

Jeter v. Willis, 6 Ky. Opin. 57.

An order dissolving an injunction is not such a final order as will confer jurisdiction on the Court of Appeals.

Ware's Admr. v. Wilson, 3 Ky. Opin. 478.

The discharge of an injunction is an interlocutory judgment from which there is no appeal.

Jones v. Hazelrigg's Admr., 3 Ky. Opin. 409.

A judgment perpetuating an injunction is final, and limitation on appeal from that judgment begins to run upon entry of same.

Dorch v. Thompson's Heirs, 3 Ky. Opin. 638.

The overruling of exceptions to a commissioner's report rejecting the claim of the litigant, is not a final order from which an appeal will be allowed.

Warner v. Hazelrigg's Admr., 4 Ky. Opin. 50.

Where a rule to show cause why sureties should not return property bonded by them, was responded to by sureties that a supersedeas had been executed, and the rule was made absolute; as no judgment had been rendered against the sureties, the order making the rule absolute is not subject to adjudication on appeal.

Hoskins v. Murphy, 4 Ky. Opin. 338.

There is no appeal from an interlocutory judgment which does not direct the payment of money.

Cummins v. Bradford, 5 Ky. Opin. 78.

An order dismissing a cause is a final judgment from which an appeal may be prosecuted.

Commonwealth v. Martin Shankes, 6 Ky. Opin. 79.

An order to pay money into court or appear and show cause to the contrary, and an order adjudging the response to the rule insufficient and

awarding an attachment for contempt, are not final orders from which an appeal will lie.

Foly v. Smith, 6 Ky. Opin. 118.

§ 68.—Nature in general.

The Court of Appeals has no jurisdiction of an appeal taken from an order of the court which was not a final order.

Anderson v. Grady, 8 Ky. Opin. 624.

An order of the court directing a party to pay money into court is an interlocutory order and can not be appealed from, but an order directing the money to be paid over to one of the parties is a final order and may be appealed from.

Settle's Admr. v. Gordon, 8 Ky. Opin. 775.

§ 73.—Appealable judgments and orders.

If the case was heard before it stood for trial, that according to § 578, Civil Code, is a clerical misprision, which can not be corrected on appeal, but by motion, when judgment was rendered.

Farmer v. Milan, 1 Ky. Opin. 344.

Where the allegations in a petition in a suit for the recovery of a debt of \$2,055.00, showed only an obligation for one-half that sum, yet the prayer asked for a judgment for the whole amount, and a verdict was rendered accordingly; it was a clerical misprision, which could only be corrected on a motion, in the lower court, and until acted on by it, the appellate court has no jurisdiction.

Mansfield v. Mansfield's Admr., 2 Ky. Opin. 182.

An appeal will lie from a judgment vacating a judgment and granting a new trial.

Pague v. Ottumwa & K. R. Co., 10 Ky. Opin. 843.

§ 75. Final judgments or decrees.

An appeal can only be taken from a final judgment, and where two days after rendition a motion is filed to set it aside, the court, so long as the motion was pending, had full power over the judgment; and not being disposed of, the judgment was not final.

Hoggins v. Elliston, 8 Ky. Opin. 328.

A final judgment is one which finally determines the rights of the parties.

Anderson v. Grady, 8 Ky. Opin. 624.

A judgment granting a new trial in an action prosecuted under the provisions of § 344 of the Civil Code of Practice (Bullitt) is final, and an appeal may be taken from it.

Atkins v. Atkins, 9 Ky. Opin. 882.

An appeal can only be taken from a final judgment.

Davis v. Montgomery, 10 Ky. Opin. 508.

Cooper's Admr. v. Louisville & N. R. Co., 10 Ky. Opin. 387.

Where one petitions for a new trial and secures it and obtains a judgment, if he is not satisfied with such judgment he has a right to appeal from it, but he can not have the original judgment modified by piecemeal and thus speculate on his chances for success in the one case or the other, but an appeal may only be taken from a final judgment, and different appeals can not be maintained on parts of a judgment.

Apperson's Admr. v. Apperson's Exr., 13 Ky. Opin. 424.

§ 76.—Nature in general.

Should the chancellor set aside orders dismissing actions, and order the court in which they were pending to replace them on the docket of preparation and trial after the expiration of the term, his power over them would cease, and an appeal therefrom will be allowed.

Miller v. Funk, 4 Ky. Opin. 224.

A judgment for divorce a mensa et thoro, and an allowance to the wife, is such a final judgment as may be appealed from.

Dial v. Dial, 5 Ky. Opin. 633.

Where a rule against a party to pay money into court is made absolute and an attachment issued thereon, it is a final order in the case and may be appealed from.

Lansdale v. Webb, 5 Ky. Opin. 611.

A judgment confirming a commissioner's report of settlement with an executor, dissolving an injunction

granted in the case and adjudging the money in the hands of the executor to belong to him, is final and confers upon the Court of Appeals jurisdiction to review it.

Roberts v. Malone, 5 Ky. Opin. 302.

Where the commonwealth's attorney moved the trial court for a forfeiture of a bail bond, introduced the clerk of the court to identify the bond, and the court refused to permit the clerk to answer the questions put to him, but the court made no order whatever respecting the motion, there can be no appeal taken from the court's refusal to allow the offered evidence, since appeals are only allowed from final orders or judgments.

Commonwealth v. Stegala, 11 Ky. Opin. 532.

Where an issue is as to the right of a person to a homestead in premises, and the question is submitted to the court for judgment, and the court decides that the party is entitled to such homestead and directs it to be set apart for her by the commissioners before any sale of the property is made to satisfy a debt, such judgment is a final judgment.

Brittain v. Foley, 13 Ky. Opin. 949.

§ 78.—Nature and scope of decision.

The overruling of defendant's motion to dismiss the proceedings and set the same aside is not a final order or judgment from which an appeal can be prosecuted.

Gooden v. Gresham, 6 Ky. Opin. 560.

Appeals can only be taken from final judgments, and the refusal of the court to make certain parties defendants is not a final order.

Hackworth v. Commonwealth, 13 Ky. Opin. 639.

§ 79. Finality as to all parties.

Where, by the decree of the chancellor, the judgment is left open to a contingency or act to be performed by one of the litigants, it is not such a final judgment as will give the appellate court jurisdiction upon appeal.

Lewis v. Watson, 1 Ky. Opin. 617.

An order directing that a case be filed away is not final, and an order

of the court overruling a motion to reinstate the case on the docket is not a judgment dismissing the action from which an appeal may be prosecuted.

Smith v. Rodes, 2 Ky. Opin. 23.

§ 82. Orders after judgment.

An order of court, reviving an action for breach of promise, upon suggestion of the death of the defendant, is not such a final order as, by consent of the parties, will give the appellate court jurisdiction.

Ware's Admr. v. Wilson, 3 Ky. Opin. 478.

No appeal lies from an order of the circuit judge refusing to certify to a claim for a reward in accordance with the statute.

Cockrill v. Commonwealth, 11 Ky. Opin. 385.

(E) NATURE, SCOPE, AND EFFECT OF DECISION.

§ 102. On demurrer.

No appeal lies from an order sustaining a demurrer, unless it is followed by a judgment in its nature final.

Williams v. Merrifield, 10 Ky. Opin. 512.

§ 110. On motion for new trial.

No appeal can be taken from an order granting a new trial.

McSwinney's Admx. v. McCay, 8 Ky. Opin. 491.

(F) MODE OF RENDITION, FORM, AND ENTRY OF JUDGMENT OR ORDER.

§ 135. Findings and conclusions of intermediate courts.

Where the chancellor makes a finding in a case that should have been tried as an action at law his finding will be treated just as the Court of Appeals would treat the verdict of a jury.

Hatton v. Harman, 9 Ky. Opin. 394.

IV. RIGHT OF REVIEW.

(A) PERSONS ENTITLED.

§ 136. Nature and grounds of right.

A non-resident defendant may take an appeal to the Court of Appeals, and

this would be an appearance to the action.

Robinson v. Hudson, 5 Ky. Opin. 256.

The right to review on appeal is not dependent on a bill of exceptions or a motion for a new trial, where the law and facts were submitted to the chancellor for decision.

United Life, Fire & Marine Co. v. Von Borries, 6 Ky. Opin. 644.

§ 147. Privity with parties.

Where appellants, G. and others, neither attacked the mortgage nor, by impleading, litigated with the appellee, M., the question of priority, nor claimed any judgment against him, as co-defendants with him, they can not maintain an appeal against him.

Moore v. Moore, 3 Ky. Opin. 654.

§ 148. Persons other than parties or privies.

Citizens of a county can not prosecute an appeal to the appellate court, in the name of the county, from the order of the county court to subscribe stock to a turnpike company.

Nelson County v. Murphy, 3 Ky. Opin. 487.

The stockholders of a corporation have no right to prosecute an appeal from a judgment against the company in its corporate capacity.

Ray v. Knowles, 5 Ky. Opin. 569.

One not a party to the record can not appeal from the judgment rendered in the cause, except in the single instance where one not a party applies to be made a party and his application is refused.

Nathan v. Jones, 9 Ky. Opin. 119.

§ 150. Interest in subject-matter.

An administratrix's right to prosecute an appeal from the judgment dismissing her petition, is not a personal but a fiducial right existing so long as she continues to act as administratrix.

Shercliff v. Cooper, 5 Ky. Opin. 774.

(B) ESTOPPEL, WAIVER OR AGREEMENT AS AFFECTING RIGHTS.

§ 154. Recognition of or acquiescence in decision.

The appearance before the appel-

late court by brief of an administrator as to whom no appeal had been taken nor bond executed, will cure any defects, errors or irregularities, against which he can not complain.

Ferguson v. Johnson, 2 Ky. Opin. 549.

All objections to the informality and irregularities were waived by the parties, as there were no exceptions taken to the proceedings.

Miller v. Miller's Admr., 1 Ky. Opin. 714.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

(A) ISSUES AND QUESTIONS IN LOWER COURT.

§ 169. Necessity of presentation in general.

Objection that a certain person was not made a party to an action can not be made for the first time in the Court of Appeals.

Moore v. Campbell, 7 Ky. Opin. 509.

The question as to the sufficiency of an answer can not be raised for the first time in the Court of Appeals, although technically defective, where it was not demurred to.

Chapman v. Fehler & Co., 7 Ky. Opin. 394.

A clerical misprision can not be made available in the Court of Appeals until the circuit court upon proper application refuses to correct it.

Brown v. Goodridge's Exr., 5 Ky. Opin. 15.

The administrator, whose duty it was to have the process properly served, could not take advantage of this error on appeal.

Miller's Admr. v. Miller's Creditors, 3 Ky. Opin. 538.

Where appellant answered both the original and cross-petition of appellee without objection to the jurisdiction of the court, but failed to answer the amended cross-petition, objection taken for the first time in the Court of Appeals, that the circuit court had

no jurisdiction to render the judgment, can not be sustained.

Louder v. McDonnell, 4 Ky. Opin. 170.

§ 171. Nature and theory of cause.

Where records of other cases were properly before the trial court upon a trial of a motion to file appellants' petition, appellants can not be heard to complain in the Court of Appeals that they were prejudiced in the lower court by certain proceedings to which they at the time interposed no objection.

Miller v. Pope, 6 Ky. Opin. 134.

Where, in the lower court, appellant treated the rule of the chancery court as a petition, and no objection to this character of proceeding was made, but he filed an answer going to the merits of the case; under § 5 of Act March 21, 1870, a litigant who has actually appeared in court, and by his conduct induced the chancellor and the opposite party to believe that he intended to waive all formal defects or omissions, can not be allowed after he is defeated upon the merits of the controversy, to take advantage of the technical objections for the first time in the appellate court.

Foreman v. Hope Ins. Co., 4 Ky. Opin. 532.

(B) OBJECTIONS AND MOTIONS, AND RULINGS THEREON.

§ 181. Necessity of objections in general.

Where two conveyances are made at different times to different persons for separate tracts of ground, there should be separate suits to set them aside; but since the statute, Civ. Code, § 114, provides that unless objection is made in the court, the error in improperly joining two actions in one is waived; no objection having been made in the court below, none can be made in the court of appeals.

Caldwell v. Caldwell, 8 Ky. Opin. 434.

A party can not except to a decision made at the instance of the adverse party, unless he had made objection to the motion, offer or request of the adverse party; and where an instruction is given at the instance and on

the motion of the appellee without objection by appellant, his exceptions to the decision of the court thereon will be insufficient to bring them before the court for review on appeal.

City of Hopkinsville v. Pelton, 10 Ky. Opin. 210.

§ 182. Nature or form of remedy.

§ 183.—Objections in general.

If no objections are made in the court below on account of misjoinder of actions, no objection thereto can be made in this court.

Johnson v. Rodes, 8 Ky. Opin. 846.

§ 191. Pleading.

§ 192.—Defects in general.

A petition in an action on a judgment against an administrator which does not allege original liability of the decedent is ground for reversal on appeal of a judgment based thereon whether the petition was objected to in the court below or not.

DeBard v. Dawson's Admr., 4 Ky. Opin. 344.

§ 194.—Objections to plea or answer, or to subsequent pleadings.

On objection that the amount prayed for in a counterclaim is blank, the counterclaimant is not entitled to recover anything thereon, where the objection is not made at the proper time, and is waived, and comes too late when first made on appeal.

Miller's Exr. v. Wilson, 11 Ky. Opin. 541.

§ 195.—Amendments and Supplemental pleadings.

Where a defendant against whom judgment by default was taken in the quarterly court appeals to the circuit court, he may file his answer after the appeal, and the case is to be tried de novo, and the fact that no issue was tendered in the quarterly court will not prevent him from filing his answer in the circuit court after appeal.

Cummins v. Fitzgerald, 10 Ky. Opin. 47.

§ 202. Evidence and witnesses.

Objection to evidence may be deemed waived where the ruling was

not excepted to and was not made a ground for a new trial.

Fishbeck v. Baughner, Brooks & Co., 7 Ky. Opin. 194.

Where evidence was admitted without objection, the question of its competency can not be raised on appeal.

Newport Street Ry. Co. v. Crumby, 4 Ky. Opin. 197.

§ 204.—Admission of evidence.

Where plaintiff was allowed the greatest possible latitude in giving his testimony, he can not object to defendant assuming the same privilege.

Rodgers v. Flick, 7 Ky. Opin. 22.

The evidence introduced on the trial was not objected to, and therefore no question as to its admission in the court below can be raised or considered in court of appeals for the first time.

Stone v. Richmond & Tate's Creek Tpk. Road Co., 1 Ky. Opin. 172.

§ 214. Instructions.

Oral instructions must be objected to when given, or a demand to have them reduced to writing, to be available on appeal.

Patrick v. Whitaker Admr., 3 Ky. Opin. 532.

Unless an objection be made to an instruction, when it is offered, it can not avail an appeal, though an exception be taken to the ruling of the court when the instruction was given.

Boone v. Clarkson, 2 Ky. Opin. 601.

Where instructions are not excepted to, the action of the court in relation to them can not be made available as a ground of reversal.

Francis v. Commonwealth, 3 Ky. Opin. 422.

§ 215.—Objections in general.

Where no objection was made and no exception taken to the giving of instructions, no question as to them is presented on appeal.

Russell v. Lynn, 8 Ky. Opin. 192.

§ 216.—Requests and failure to give instructions.

No exceptions were taken to the ruling of the court in giving instructions asked for by appellee and refusing the one asked for by appellant,

which must be regarded as a waiver of the errors of the court.

Green & Taylor County Tpk. Co. v. Hickey, 3 Ky. Opin. 388.

No objection was made to the instruction asked by appellee, nor was exception taken when it was given, nor was any exception taken to the opinion of the court overruling the one asked by appellant, so that whether there was any error committed in giving or refusing the instruction can not be considered by the court on appeal.

Gregory v. Traylor, 3 Ky. Opin. 503.

§ 223. Judgment.

A judgment of the court on the law and the facts submitted to it is as binding as the verdict of a jury.

Riley v. Louisville L. & C. R. Co., 6 Ky. Opin. 183.

§ 227. Proceeding for review.

Objections not made to the filing of a bill of exceptions at a special term of the lower court, can not be made for the first time in the court of appeals.

Shannon v. Trimble, 2 Ky. Opin. 223.

§ 230. Necessity of timely objections.

On appeal from a judgment by default as to the validity of a marshal's bond reciting that "David Webb, as Marshal," and others as "sureties do hereby covenant that the said David Webb as constable of Daviess county shall well and truly," etc., an objection as to this informality is not available for the first time in the appellate court.

Webb v. Hall & Sutton, 2 Ky. Opin. 558.

Where a defendant makes no objections to the filing of an amended complaint in the court below, it is too late for him to raise the question for the first time in the Court of Appeals.

Louisville, C. & L. R. Co. v. Ramsey, 11 Ky. Opin. 274.

§ 231. Necessity of specific objection.

The Court of Appeals will not reverse on account of an erroneous instruction where the record fails to show that any objection or exception

was taken to the giving of such instruction.

Kentucky Central Railroad v. Patton, 10 Ky. Opin. 604.

No contention can be maintained in the Court of Appeals as to the competency of evidence, where no objection to it is shown by the record to have been made in the trial court.

Boyd v. Morris, 10 Ky. Opin. 768.

There must be both an objection and an exception to an instruction given by the trial court before the Court of Appeals can consider it to determine whether it is erroneous.

Crooks & Co. v. Dillion, 10 Ky. Opin. 638.

§ 234. Necessity of motion presenting objection.

§ 236.—In proceedings before trial or hearing.

It is a clerical misprision to render judgment before the cause stands for trial, but where no motion has been made in the lower court to correct the error, the Court of Appeals can not reverse.

Hayner & Dunlevy v. Templeman, 5 Ky. Opin. 542.

§ 238.—As to judgment, or modification or vacation of judgment.

Where a judgment has been entered in a cause against a person who was not a party to the action, before such person can appeal from such a judgment he must make an effort to set the judgment aside.

Barker v. Barker, 11 Ky. Opin. 203.

§ 243. Effect of failure to make objection.

Appellants were held not to have waived the right to certain judgments reversed because of their failure to appear in the trial court and object to the character of the proceedings therein.

Campbell v. Commonwealth, 6 Ky. Opin. 1.

In the absence of objection to evidence or in the absence of exceptions to instructions, any errors contained therein will be deemed to have been waived.

Marshall v. Commonwealth, 6 Ky. Opin. 742.

The Court of Appeals will not reverse on account of oral instruction where neither side objects.

Shotwell v. Yelton, 5 Ky. Opin. 148.

(C) EXCEPTIONS.

§ 248. Necessity in general.

Where the court refused to permit the filing of a bill of exceptions for the reason that it was not offered at the proper time, counsel should have tendered his bill of evidence and excepted to the ruling of the court in refusing the filing, and made the bill of evidence thus offered and his last exception a part of the record.

Ford v. Clement Shobe, 7 Ky. Opin. 442.

On appeal of a case from the county to the circuit court, the latter has the right to correct errors in a commissioner's report not excepted to in the county court settlement.

Dodd, Admr., v. Kuykendall, 3 Ky. Opin. 193.

Appellants did not except to the order of submission, and in the absence of such fact it can not be assumed that they were thereby prejudiced.

Crotenkemper & Co. v. Hill & Smith, 5 Ky. Opin. 680.

Where misconduct of a party is assigned as error, it being claimed that his attorney was guilty of such misconduct in his argument, it will not be considered an appeal when the record fails to disclose the fact that any exception was taken to the ruling of the court thereon.

Chicago, St. L. & N. O. R. Co. v. Coffee, 13 Ky. Opin. 823.

§ 249. Necessity on trial by court or referee in general.

The Court of Appeals will not inquire whether there were exceptions to a master's report, but if the report is erroneous, and the judgment is based upon it, and the judgment is appealed from, the Court of Appeals will reverse the judgment.

Johnson v. Chase, 5 Ky. Opin. 502.

§ 252. Review of rulings as to pleadings.

It is the duty of an appellant, in or-

der to get a review by the appellate court, to file exceptions to the ruling of the court below on refusal to permit the filing of an amended answer, and then present and file a bill of exceptions making the rejected amended answer a part thereof, and incorporating them in the record, as it is not the official duty of the clerk to state that the rejected pleadings are the same that he copies, and the appellate court can not upon such unofficial statement so treat them.

Orr v. Hedger, 2 Ky. Opin. 51.

§ 258. Review of proceedings at trial.

An exception to an instruction is not sufficient to authorize the Court of Appeals to inquire into the error, if there be one in giving an instruction, but it must be objected to when asked for, and then the ruling of the court, if given, excepted to.

Salle v. Hurt, 5 Ky. Opin. 268.

Where the ruling of the court in giving instructions was not excepted to by appellant, the Court of Appeals will not review the instructions.

Towler v. Wilson, 5 Ky. Opin. 10.

§ 260.—Rulings as to evidence.

Where exceptions are not taken to the decision of the court, in sustaining exceptions to the evidence, it can not be subject to revision by the court of appeals.

Potts v. Bowler, 1 Ky. Opin. 134.

Where a ruling of the court, sustaining exceptions to the depositions, was not excepted to, the propriety of the ruling is not before the court on appeal.

Ford v. Crockett & Hildreth, 1 Ky. Opin. 382.

§ 263.—Instructions, and failure or refusal to give instructions.

Where the record does not show exceptions to the giving or refusing of instructions below, the appellate court can not revise it.

Burrick v. Burns, 2 Ky. Opin. 62.

To be available on appeal, an exception to the action of the court in giving instructions asked for by appellees, must be taken at the time, and not after the motion for new trial had been overruled.

Cooper v. Thomas, 8 Ky. Opin. 368.

§ 265. Exceptions to decision of findings by court.

One failing to except to an order requiring him to elect which of the causes of action he will prosecute waives his right to have the Court of Appeals pass upon the question.

Smith v. Berry, 8 Ky. Opin. 795.

§ 272. Necessity of timely exception.

Where the court explains the instruction to the jury, the error, if one, can not be made available in the Court of Appeals unless excepted to at the time.

Salle v. Hurt, 5 Ky. Opin. 268.

§ 276. Effect of failure to take proper exception.

Where a plaintiff did not except to an order permitting the filing of a cross-petition, but on the following day made a motion to set aside the order, and excepted to the overruling of that motion, such exception did not reach back to the order permitting the amendment to be filed, and the order, permitting the filing of the amendment, was waived.

Lair v. Reynolds, 7 Ky. Opin. 182.

§ 280. Waiver of exceptions.

Where evidence is excepted to as incompetent and the court below fails to pass on the question it must be regarded as waived.

Hodges v. Cassity, 5 Ky. Opin. 489.

Neither the admissibility of evidence nor the competency of evidence offered by depositions can be considered by the Court of Appeals where it is not shown that the trial court ruled upon the exceptions tendered by appellants, as such exceptions will be treated as waived by appellants.

Harris & Martin v. Neeley, 10 Ky. Opin. 627.

Where the trial court fails to act upon exceptions to depositions and upon the report of a commissioner, and afterward the case is submitted by agreement, and no complaint is made that the exceptions had not been acted upon, such exceptions are waived and the case will be considered as if no exceptions to the evidence had been taken, and since the trial court took

no action as to the commissioner's report, there is nothing to review here.

Holmes v. Curtis, 13 Ky. Opin. 369.

(D) MOTIONS FOR NEW TRIAL.

§ 281. Necessity in general.

In order for the appellant to avail himself, on appeal, of errors committed in the lower court in refusing to allow counsel to comment on the answers of defendant to the jury, such errors must be embraced in a written application for a new trial at the time of making the motion. Section 372, Civil Code.

Swan's Admr. v. Vaughn, 1 Ky. Opin. 620.

The provisions in § 372, Civ. Code, as to applications for a new trial by motion, etc., requires all errors which the party complaining deems to have been committed prejudicial to him in the progress of the trial, to be presented in writing as grounds for a new trial, in order to direct the attention of the appellate court to the alleged errors for correction, the mere objection to the introduction of testimony during the trial not being sufficient.

Delaney v. Lee, 2 Ky. Opin. 451.

It is essential that the party complaining shall make a motion for a new trial in order to have errors corrected by the Court of Appeals.

McHenry v. Phelps, 5 Ky. Opin. 102.

The Court of Appeals has no power to reverse a judgment on account of the giving of an instruction excepted to, where the error in giving such instruction was not assigned as a ground for a new trial.

Broylton v. Spooner, 9 Ky. Opin. 321.

Even conceding that it was error to admit certain evidence at the trial, where such error is not designated as a ground for a new trial, the Court of Appeals can not review the action of the trial court relative thereto.

Forsyth v. Jones, 9 Ky. Opin. 502.

Nothing is brought before the court of appeals in an appeal where no mo-

tion for a new trial has been made, except the pleadings, verdict and judgment, and the grounds alleged must be specific as to the errors relied upon for a reversal.

Bryant v. Joyce, 10 Ky. Opin. 121.

When an error is committed by the trial court, a party against whom it is committed can not have the error passed upon by the Court of Appeals, without first bringing the matter before the trial court by motion for a new trial and giving that court an opportunity to correct the error.

Dils v. Adkins, 11 Ky. Opin. 298.

In the absence of a motion and grounds for a new trial, nothing is brought to this court for review on appeal except the inquiry as to whether the pleadings state any cause of action or defense and whether the evidence heard and properly presented by bill authorizes the judgment, and every other cause is waived by the failure to file a motion for new trial.

Jefferson v. Watson, 13 Ky. Opin. 282.

While any errors committed during the progress of a trial are not subject to revision by the Court of Appeals, unless such errors are presented to the trial court in a motion for a new trial, still there may, in the absence of a motion for a new trial, be an inquiry as to whether the pleadings state any cause of action or defense and whether there is any evidence heard and properly presented by bill to support the judgment.

Jefferson v. Watson, 13 Ky. Opin. 418.

It is never necessary in a motion for a new trial to specify errors not occurring during the progress of the trial, and errors occurring prior to the trial will be considered by the Court of Appeals when properly brought before it, and a motion for a new trial as to them is not proper.

Jefferson v. Watson, 13 Ky. Opin. 418.

§ 287. Review of proceedings at trial. Under Civ. Code Prac., § 372, requiring the grounds for a new trial to be specified in writing, failure to present the admission of evidence as a

ground for a new trial excludes such grounds from consideration on appeal, as it will be treated as waived.

Buchanan & Rodgers v. Austin, 6 Ky. Opin. 47.

Where the court refused to permit a defendant to offer evidence to sustain the allegation of his answer respecting the wrongful conversion of the property, and this was not made a ground for a new trial, the Court of Appeals will not pass on the alleged error.

May v. Dils, 10 Ky. Opin. 225.

§ 291.—Rulings as to submission of case or question to jury.

The error of the court in giving an erroneous instruction to the jury, not assigned as a ground for a new trial, can not be raised for the first time on appeal, and the Court of Appeals will not pass upon such error.

Gutswilder v. Wagner, 11 Ky. Opin. 371.

§ 292.—Instructions, and failure or refusal to give instructions.

Where there is nothing in the motion for a new trial calling the attention of the court to errors in an instruction, the Court of Appeals will not consider the error, and it will not consider any error not specifically assigned and presented by motion for a new trial.

Lynch v. Stapleton, 12 Ky. Opin. 119.

§ 305. Necessity and Sufficiency of exception to decision.

It is not necessary that a litigant should formally except to the opinion of the court in overruling a motion for a new trial.

Wade v. Harvey & Keith, 3 Ky. Opin. 120.

VI. PARTIES.

§ 321. Appellants or plaintiffs in error.

§ 322.—Proper or necessary parties in general.

A person who was not a party in the cause below can not appeal from a judgment rendered.

Stockton v. Bank of Louisville, 8 Ky. Opin. 171.

One having filed his petition and been discharged in bankruptcy more

than two years after a suit was instituted in the state court against him can not prosecute an appeal from the judgment rendered therein because his right to do so has passed to his assignee in bankruptcy.

Wilson v. McMullen, 12 Ky. Opin. 77.

§ 326. Appellees, respondents, or defendants in error.

§ 327.—Proper or necessary parties.

An appellant may prosecute his appeal as against one or more of the parties to the record, but if he fails to make the proper parties, the remedy is by motion to dismiss the appeal.

McGuire's Exr. v. Robinson's Admr., 10 Ky. Opin. 518.

§ 331. Death.

§ 333.—Pending appeal or writ of error.

Where a suit is pending on appeal to the Court of Appeals, and one of the parties dies, the action may be revived against his heirs and then decided; and in such a case no revivor is necessary by the lower court; but after decision reversing the cause where one of the heirs has died the action may properly be revived below as to the heirs of such heir, and after such revivors the sale of real estate made thereunder should be confirmed.

Howell's Exr. v. Smith, 13 Ky. Opin. 700.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

(A) TIME OF TAKING PROCEEDINGS.

§ 338. Nature and operation of limitations in general.

Appeals may be taken to the Court of Appeals within three years from final judgments or orders.

McSwinnery's Admx. v. McCay, 8 Ky. Opin. 491.

§ 343. Commencement of period of limitation.

As an appeal is required to be prosecuted within sixty days after the rendering of the judgment, and not after

the day of the judgment, that day is included in the count.

Vaughn v. Walters, 3 Ky. Opin. 460.

In ascertaining the time in which an appeal is to be taken to the circuit court, the day on which the judgment was rendered and the day on which the appeal is taken are both to be counted.

Moore v. Suerd, 8 Ky. Opin. 485.

§ 349. Effect of disability or death of party.

If the party defendant is an infant married woman, or person of unsound mind, at the time the judgment is rendered, then an appeal may be taken within one year after the disability is removed.

Dollins v. Perry, 5 Ky. Opin. 763.

§ 351. Taking and perfecting proceeding in time.

Where, after a new trial had been refused upon motion, two weeks' time was given to file a bill of exceptions, the filing of same in three weeks, in the clerk's office by consent, is not evidence that the appellate court can take cognizance of.

Allen v. Vaughn, 4 Ky. Opin. 467.

The mistake of a clerk of the court in advising appellant as to the appeal is not a defense against a motion to dismiss the appeal because not perfected until after expiration of the sixty days from rendition of judgment, since it is the duty of appellant and his counsel to know the law, and not rely on the opinion of the clerk.

Vaughn v. Walters, 3 Ky. Opin. 460.

The filing of the record in the clerk's office with the names of the parties, appellants and appellees, constitutes the appeal; and the suing out of the summons is not the appeal, nor is this step necessary to secure the right of appeal.

Gillen v. Jones, 9 Ky. Opin. 386.

One desiring to appeal from a judgment of the city court to the circuit court may do so by filing a transcript and executing an appeal bond, at any time within sixty days after the judg-

ment is taken, the day of judgment being counted as one.

Greer v. Spencer, 11 Ky. Opin. 358.

§ 356. Effect of delay or failure to take proceedings.

An appeal from an agreed judgment, after the time allowed, will not reopen the judgment, but is held conclusive as to the question of liability therein.

Graves v. Hickerson, 3 Ky. Opin. 112.

If the sixty days allowed by law in which to take an appeal has expired before the appeal has been taken, the appeal should be dismissed instead of rendering other judgment for the same amount.

McManama v. Lucas, 5 Ky. Opin. 445.

(C) PAYMENT OF FEES OR COSTS, AND BONDS OR OTHER SECURITIES.

§ 372. Necessity of security to perfect appeal or other proceeding.

In prosecuting an appeal from the quarterly court to the circuit court, the party against whom the judgment is rendered is required to produce to the clerk of the circuit court a certified copy of the judgment and the amount of the cost, and execute before the clerk a bond with one or more sufficient sureties to the effect that appellant will satisfy and perform the judgment that may be rendered on appeal.

Monarch v. Craig, 7 Ky. Opin. 146.

§ 378. Sureties.

§ 381.—Sufficiency and justification.

When a surety on an appeal bond covenanted to satisfy and perform the judgment in case it should be affirmed on the appeal, and the particular appeal was dismissed and the judgment appealed from was affirmed on a subsequent appeal, it was held that such security was liable, as the dismissal of the appeal constituted a virtual affirmation of the judgment.

White v. McKinley, 10 Ky. Opin. 526.

IX. SUPERSEDEAS OR STAY OF PROCEEDINGS.**§ 458. Right to supersedeas or stay in general.**

Appellant is not bound to supersede the judgment, and payment thereof can not be regarded as voluntary on his part because an execution had already issued from the quarterly court, and his property had been actually seized before the dissolution of his injunction.

Sizemore v. Thomas, 5 Ky. Opin. 703.

§ 462. Upon security.

A petition alleging the execution of a supersedeas bond, and all facts of its course through the Appellate Court and alleging affirmance of the judgment, and making the bond an exhibit, constitutes a good cause of action, and is not demurrable.

Coke v. Porter, 4 Ky. Opin. 26.

§ 484. Scope and effect as stay.

The mere execution of a supersedeas bond, without the issuance of the order of supersedeas, will not render the sureties liable for costs in the previous suits and rents and damages for being kept out of the possession of the property in litigation, during the pendency of the appeals.

Watson v. Nudham, 4 Ky. Opin. 385.

X. RECORD AND PROCEEDINGS NOT IN RECORD.**(A) MATTER TO BE SHOWN BY RECORD.****§ 493. Jurisdiction of lower court.**

Where a question, if before the court at all, must have been submitted by agreement of the parties, the record should exhibit the state of facts authorizing the court to try and determine the issue.

Tabb & Co. v. Long, 7 Ky. Opin. 472.

§ 498. Presentation and reservation of grounds of review.**§ 500.—Rulings by lower court.**

Where the record fails to show that the court below acted on a demurrer,

it will be presumed that it was overruled.

Brown v. Wells, 1 Ky. Opin. 543.

§ 511. Making and filing of bill of exceptions, case, or statement.

A bill of exceptions which was not filed within the time allowed by the court, or within the authorized extension of time, is not a part of the record on appeal.

United Life, Fire & Marine Ins. Co. v. Eigenmore, 6 Ky. Opin. 524.

§ 512. Proceedings of intermediate courts.

Where the record of a former suit between the same litigants is not copied into the record taken to the appellate court, it can not avail as grounds of objection, insisted on for the appellant, that the cause of action was barred by a previous judgment.

Sullivan v. Mallony, 2 Ky. Opin. 56.

Where the clerk of the court neglected to make any indorsement on the papers on appeal from the quarterly to the circuit court, but appellant had done all that the law required of him in prosecuting the appeal, the mere fact of the failure of the clerk to indorse the papers or to issue a supersedeas, or attest the bond, will not preclude the party from his right to prosecute the appeal.

Monarch v. Craig, 7 Ky. Opin. 146.

§ 514. Successive appeals or proceedings for review.

Where none of the papers are copied into the bill of exceptions or made a part of the record, but the clerk in a note suggests that there is a copy of the record of the case between the same parties on file in the Court of Appeals, but there is no agreement that the same may be considered in the case in hand as a part of the record, the evidence is not before the Court of Appeals.

Gillisple v. Stagner, 5 Ky. Opin. 660.

(B) SCOPE AND CONTENTS OF RECORD.**§ 516. Proceedings included in general.**

A statement filed by counsel for the

first time in the Court of Appeals or circuit court, on appeal from the county court to the effect that he had no notice of the proceedings and was himself the administrator, can not be regarded as a part of the record.

Curd's Admr. v. Walker's Admr.,
7 Ky. Opin. 92.

§ 518. Pleadings and proceedings relating thereto.

The record on appeal was held not to contain a copy of the reply, if filed to the counterclaim.

Holland, Admr., v. Buckner, 7 Ky. Opin. 164.

Where the parties litigate a question raised by a document misstyped "Reply," and it was with the other papers on the trial, it is a part of the record though not marked filed.

Davidge v. Hopson, 1 Ky. Opin. 536.

A judgment on an amended petition, though unanswered, will not be disturbed, where the petition is not made a part of the record on appeal.

Logan v. Crawford, 3 Ky. Opin. 232.

An answer tendered by appellant and rejected by the court, not made a part of the record by bill of exceptions or order of court, is not a part of the record and will not be considered.

Denny v. Miller, 8 Ky. Opin. 144.

Where a pleading offered for filing is rejected it will not be a part of the record unless made so by a bill of exceptions or order of the court.

Graham v. Graham, 8 Ky. Opin. 763.

Unless a rejected pleading is made part of the record by bill of particulars or order of the court, the clerk has no right to copy it in a transcript and it will not be considered by the Appellate Court.

Cleary v. Offutt, 8 Ky. Opin. 691.

Where in the trial court a party offers to file a pleading, which is denied by the court, such pleading does not become a part of the record on appeal, unless made so by bill of exceptions.

Johnson v. Rodes, 8 Ky. Opin. 846.

Where persons file a petition to be made parties, and the clerk certifies only that the paper copied is the pleading offered by them, such petition is not thereby made a part of the record.

Tye v. Finley, 10 Ky. Opin. 849.

§ 520. Interlocutory motions, orders, and judgments.

A record made out by the clerk in an appeal should contain the orders of the lower court in their chronological order, and every order should be dated.

Burchett v. Biggs, 9 Ky. Opin. 22.

§ 525. Instructions.

Instructions offered but refused by the court do not become a part of the record by a mere recital in an order of the court that they were asked and refused; but they must be made a part of the record either by the court's order or by bill of exceptions.

Martin & Ball v. Shelby & Dalton,
8 Ky. Opin. 601.

§ 542. Affidavits accompanying or supplementing transcript.

Where it is sought to show what papers were filed on appeal from the quarterly to the circuit court, such fact may be shown by affidavits, where the clerk of the circuit court has died since the filing of the papers.

Monarch v. Craig, 7 Ky. Opin. 146.

(C) NECESSITY OF BILL OF EXCEPTIONS, CASE, OR STATEMENT OF FACTS.

§ 544. Decisions not otherwise reviewable.

Where the court refuses to allow an amended answer to be filed, and defendant desires to have the legality of the ruling tested on appeal, he should bring the question to the Court of Appeals by bill of exceptions.

Johnston v. Walker, 6 Ky. Opin. 464.

In the absence of a bill of exceptions certifying the evidence heard by the circuit judge on the trial of the exceptions to the award, the Court of Appeals can not adjudge that an

error was committed by overruling them.

Steele v. Capitol Hotel Co., 1 Ky. Opin. 376.

Where the lower court erred in not permitting an amended pleading to be filed, the error is not available in the appellate court, where not made part of the record by a bill of exceptions or order of the court identifying it. *Coffee v. Cook*, 2 Ky. Opin. 222.

Where it does not appear from any bill of exceptions signed by the special judge trying the case, or otherwise, what evidence was heard on the trial, or whether any other evidence was offered or heard, a motion will be sustained in this court to strike from the record what purports to be the evidence.

Tipton v. Estes, 13 Ky. Opin. 335.

Where an appeal is taken because of an alleged error of the trial court in giving a peremptory instruction to bring in a verdict for the defendant, this court can only determine the question of error when the appellant brings before the Court of Appeals by bill of exceptions showing the material facts which the evidence conducted to prove on the trial, and in the absence of such a bill of exceptions, duly authenticated, the court will presume the instruction complained of to be proper.

Kennedy v. McElroy, 13 Ky. Opin. 610.

Where the error assigned is that the verdict is against the evidence, the appellant, to procure any decision in this court, must bring to this court a bill of exceptions duly signed by the trial judge and containing all of the evidence.

Peoples v. Fitchner, 13 Ky. Opin. 816.

§ 545. Proceedings not part of record. Instructions given at the trial should be identified by their being made a part of the record by an order of court, or they should be shown in the bill of exceptions signed by the trial judge, and instructions will not be considered on appeal when

not made a part of the record as above shown.

Chicago, St. L. & N. O. R. Co. v. Coffee, 13 Ky. Opin. 823.

What is not in a bill of exceptions over the signature of the judge is not a part of the record and does not become so by being copied and attached to the record by the clerk.

Bloom & Co. v. Kingston, 13 Ky. Opin. 893.

§ 546. Presentation of grounds of review.

A bill of exceptions must contain all the instructions given, otherwise the Court of Appeals can not review the action of the trial court in giving or refusing instructions.

Mosley v. Mosley, 7 Ky. Opin. 359.

Where it is not stated in any of the numerous bills of exceptions that any or either of them contain all the instructions given by the court to the jury, the Court of Appeals can not consider alleged errors in the instructions or in refusing to instruct the jury.

Wallace v. Commonwealth, 1 Ky. Opin. 316.

Where the instructions were not made a part of the bill of exceptions, signed by the judge, they are no part of the record, and will not be considered by this court.

Clements v. Wathen's Admr., 1 Ky. Opin. 202.

In the absence of a statement in a bill of exceptions that it contained all the evidence heard on the trial in behalf of both parties, the Court of Appeals will not reverse the case.

Boucher v. Satterfield, 4 Ky. Opin. 624.

Where rulings on evidence were presented in twenty-five bills of exception, when they could have been presented in one comparatively short bill of exceptions, thereby needlessly encumbering the record, such practice was denounced by the court.

Lee's Admr. & Hunley v. Harper, 7 Ky. Opin. 618.

Unchallenged statements in a bill of exceptions must be taken as true.

Cummins v. Commonwealth, 12 Ky. Opin. 215.

§ 548.—Evidence.

Where a transcript of the testimony in another case has no caption, and does not identify itself by a statement of the matter which it is intended to contain, and is unsigned, and is marked filed, but appears to be a transcript of the evidence given upon the trial of the defendant, it can not be treated by the Court of Appeals as a part of the record.

Bowman v. Commonwealth, 7 Ky. Opin. 656.

Court of Appeals will not consider evidence said to have been submitted to the trial court when the same is not made a part of the record by a bill of exceptions.

Haynes v. Bolin, 8 Ky. Opin. 133.

Deeds or other exhibits relied on as evidence of title must be made a part of the record on appeal by an entry on the order book, or they must be made a part of the bill of evidence; and when they are not so made a part of the record they can not be considered by the Court of Appeals.

Baker v. Gilbert, 11 Ky. Opin. 912.

(D) CONTENTS, MAKING, AND SETTLEMENT OF CASE OR STATEMENT OF FACTS.**§ 564. Time for making and filing or service.**

A bill of exceptions filed at a subsequent term of the court with an order extending the time, will not be considered by the Court of Appeals.

McMahan v. Cobb, 2 Ky. Opin. 181.

(E) ABSTRACTS OF RECORD.**§ 586. Scope and sufficiency.**

Where each party prepared a separate draft of testimony, each constituting a bill of exceptions, and the one conflicted with the other, it was doubted whether the evidence could be considered on appeal.

Taylor & Logan v. Floyd & Page, 7 Ky. Opin. 493.

(G) AUTHENTICATION AND CERTIFICATION.**§ 613. Bill of exceptions.**

An unsigned bill of exceptions is of

no force or effect, and can not be considered by the Court of Appeals.

Dedman v. Scarce, 8 Ky. Opin. 393.

In an election contest on the grounds that votes were illegally cast or not properly counted, if the appellant desires this court to pass upon such questions, he must bring before the Court of Appeals all the evidence, by a properly certified bill of exceptions.

Davis v. Gatliff, 13 Ky. Opin. 407.

(H) TRANSMISSION, FILING, PRINTING, AND SERVICE OF COPIES.**§ 619. Necessity and duty of filing in appellate court.**

Appeal is taken from judgments of quarterly and other inferior courts by producing to the clerk of the court to which it is taken a certified copy of the judgment and amount of the costs and by executing a bond before the clerk with surety to be approved by the clerk, and where the bond is executed the appeal will not be dismissed because of the failure to produce such copy.

Case v. Strong, 9 Ky. Opin. 77.

§ 620. Time for transmission and filing.

When an appeal is granted by the court rendering a judgment, the record must be filed in the clerk's office of the Court of Appeals ninety days after judgment rendered, subject to the power of the court to extend the time not later than the first day of the second term after judgment, but an appeal may be granted by the clerk of the Court of Appeals at any time within three years from the date of judgment.

McCarley's Exr. v. Perkins, 8 Ky. Opin. 493.

Where an appellant procures all of the record and papers in a cause to be copied in a transcript, and files it in the clerk's office of the Court of Appeals before he is required to do so under the statute, such appeal will not be dismissed on motion of the appellee because filed too soon.

Mitcheson v. Norse, 9 Ky. Opin. 683.

§ 624.—Extension of time.

Where the time for filing the record in an appeal had expired before an extension of time was asked, the motion for extension will be overruled, and in such a case appellant can obtain an appeal from the clerk of the Court of Appeals by filing the record in his office, and by making the proper endorsement and having summons issued and served.

Rudd v. Nock, 9 Ky. Opin. 603.

(I) DEFECTS, OBJECTIONS, AMENDMENT, AND CORRECTION.**§ 634. Effect of defects in general.**

An appellant filing a transcript of the record in the clerk's office of the Court of Appeals must endorse thereon or on a paper filed therewith the names of all the parties, appellant and appellee, and where he fails to do so and only one of the parties to the action in favor of whom judgment was rendered, is named as appellee, who has only a nominal interest in the controversy, the appeal will be dismissed.

Hickman v. Ball, 8 Ky. Opin. 641.

§ 652. Amendment in appellate court.**§ 653.—Authority.**

Appellants should not be allowed on appeal to amend a defective warrant in a proceeding for forcible entry and detainer, in order to escape the consequences of the judgment appealed from, and thereby to tax appellee with the costs of the proceeding on the warrant.

Billingsley v. Gwathney, 7 Ky. Opin. 1.

§ 654.—Supplying omissions.

Where no exceptions were taken to the action of the court in giving and refusing to give instructions, the record can not be so amended by agreement of attorneys to show that such exceptions were taken.

Minnis v. Commonwealth, 8 Ky. Opin. 495.

Where the record on appeal fails to show that any exception was taken to the giving of an instruction, it may be amended when there is something to amend by, but it can not be amend-

ed where the defect can only be supplied from the mere recollection of the judge or the attorneys.

Louisville City R. Co. v. Saltmarsh, 8 Ky. Opin. 856.

(K) QUESTIONS PRESENTED FOR REVIEW.**§ 672. Errors on face of record.**

One who appeals his case to the Court of Appeals has the burden of bringing to this court a record showing that reversible error occurred in the trial court.

Prather v. Prather's Admr., 13 Ky. Opin. 636.

§ 678. Pleading.

Where an amended petition is claimed to have been offered for filing, but is not copied into the record on appeal, and an affidavit for continuance is not in the record, the Court of Appeals can not know whether any error was committed or not.

Powell v. Mead, 11 Ky. Opin. 292.

§ 683. Depositions and affidavits.

This court can not consider depositions copied into the record by the clerk when such depositions are not embraced in the bill of evidence; but, to entitle an appellant to be heard, he must cause to be brought to this court a proper record showing what took place in the trial court so the court can ascertain whether errors were committed.

Young's Admr. v. Louisville, C. & L. R. Co., 12 Ky. Opin. 760.

§ 689. Admissibility of evidence.

On an appeal, where the original papers, books, etc., used at the trial below, are shown to have been destroyed by fire, the appellate court can not take judicial cognizance of same, no copies appearing to have been made.

Macklin v. Ward, 3 Ky. Opin. 108.

§ 693. Sufficiency of evidence.

The preponderance of the evidence is a question for the jury, and the Court of Appeals will not disturb their verdict, unless they were wrongfully instructed as to the law.

O'Daniel v. O'Daniel, 6 Ky. Opin. 476.

XI. ASSIGNMENT OF ERRORS.

§ 719. Necessity.

Although an alleged error was made a ground for a new trial, it will not be considered in the Court of Appeals, unless it be also assigned as error.

Bunt's Admr. v. Chiltan, 10 Ky. Opin. 404.

Where the ruling of the trial court in refusing a continuance is excepted to at the time made, but such ruling is not assigned as error in this court, such error will not be considered here.

Kentucky Cent. R. Co. v. Carey, 12 Ky. Opin. 450.

§ 723. Specification of errors.

§ 724.—In general.

Where it is assigned, "That the judgment is erroneous," if such a general assignment can be considered at all it will be for the purpose only of determining the right of recovery by the appellee on the facts of the case, without regard to the pleadings.

Richardson v. Malone, 9 Ky. Opin. 876.

An assignment of error that "The court erred in overruling the defendant's motion for a new trial" is not sufficient to raise any question in the Court of Appeals.

Vest v. Norman, 10 Ky. Opin. 754.

The rule that errors complained of must be specified with particularity is well established, and will be followed by the Court of Appeals.

Conover v. Conover's Admr., 10 Ky. Opin. 847.

Where there is no assignment of error specifying the failure of appellees to make and file an affidavit purging their claim after the death of appellant's ancestor and before the rendition of judgment, the Court of Appeals can not look into such question.

Tutt v. Kincaid, 11 Ky. Opin. 310.

A signed statement on the record that "The defendant * * * comes now and assigns for errors, and excepts to the whole of the judgment rendered in this case," does not constitute an assignment of errors, since

it fails to specify the particular errors on which he means to rely, as provided by Civ. Code (1876), § 756.

Harned v. Harvey & Smith, 11 Ky. Opin. 437.

§ 731.—Verdict, findings, or decision.

An assignment that the verdict is against the law and the evidence will only authorize this court to consider the evidence on which the verdict is based.

Bryant v. Joyce, 10 Ky. Opin. 121.

§ 732.—Motions in arrest, for new trial, or for rehearing.

An assigned error will not authorize a reversal, unless it was named and relied upon as a ground for a new trial.

Montfort v. Hanna, 12 Ky. Opin. 475.

The mere reference to the grounds for a new trial in the assignment of error does not sufficiently specify the matter or ground of error.

Hanners v. Baker, 12 Ky. Opin. 127.

An assignment of error in this court that "the court erred in overruling appellant's motion to grant him a new trial on the grounds set out in the motion" is sufficient, as such an assignment calls in question all the grounds relied on in the motion for a new trial below.

Dulaney v. Nunnery, 13 Ky. Opin. 710.

§ 750. Scope and effect of assignment.

Assignments of error not embraced in the grounds for a new trial will not be considered on appeal.

Bank of Columbia v. Bush, 11 Ky. Opin. 559.

XII. BRIEFS.

§ 755. Necessity.

Where the correctness of a long and complicated master's report on accounts is involved in an appeal, the Court of Appeals, without the aid of a brief from the appellant, will not read and consider the long record to see if it can find errors upon which to reverse in favor of a party who neglects to present the grounds upon which he asks relief.

Roe v. Bryan, 9 Ky. Opin. 118.

§ 756. Form and requisites in general.

A brief not signed by a party or his regular licensed attorney, can not avail anything.

Coffey v. Stokes & Son, 6 Ky. Opin. 516.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.**§ 777. Dismissal on consent.**

When an appellant directs his appeal to be dismissed it will be done.
Tye v. Finley, 10 Ky. Opin. 849.

§ 779. Grounds for dismissal.**§ 780.—In general.**

When an appeal is taken more than two years after the date of a judgment appealed from, it should be dismissed, as the statute of limitations is a bar to such appeal.

Broseke v. Carton, 11 Ky. Opin. 540.

An appeal will be dismissed where the transcript was not filed in this court until April 5, 1884, when the appeal was granted May, 1883.

Beadles, Wood & Co. v. McElrath & Co., 12 Ky. Opin. 682.

§ 782.—Want of jurisdiction.

An appeal to the Court of Appeals will be dismissed where the amount in controversy is not sufficient to bring the case within the jurisdiction of either this court or the superior court.

Stackhouse v. Mt. Gilead Baptist Church, 12 Ky. Opin. 352.

Where one has on his application been made a party defendant and sets up a lien on the property involved, and judgment is had, and he appeals to this court, his appeal will be dismissed where it is not made to appear that the amount in controversy is as much as \$100.

Grubbs v. Franks, 13 Ky. Opin. 837.

There is no law authorizing an appeal from the county court to the Court of Appeals, and such an appeal should be dismissed.

Preston v. Bell County Court, 13 Ky. Opin. 1004.

§ 785.—Defects relating to record.

Where there is no bill of evidence certified to the Court of Appeals in an appeal from the county court of a road case, the appeal will be dismissed, since cases stand on the same basis as appeals from judgments of the circuit court to the Court of Appeals from a proceeding admitting or rejecting probate of wills.

Taylor v. Bassett, 6 Ky. Opin. 354.

§ 786.—Proceedings frivolous or for delay.

The Court of Appeals will dismiss an appeal when from the record it appears that it is prosecuted solely for delay, and an affidavit of the appellant that the appeal is not prosecuted for delay will not be considered.

Longshaw v. Lanning & Jackson, 11 Ky. Opin. 628.

§ 794. Motion for new trial.

Pending action on a motion to dismiss an appeal, the filing of a brief by appellee on the merits of the case does not constitute a waiver of the motion; the filing of the brief and motion to dismiss were simultaneous and intended to operate alternately.

Otis & Baird v. Barker, 2 Ky. Opin. 63.

An appeal will be dismissed on motion where the order appealed from is not a final order.

Skillman v. Frost's Exr., 11 Ky. Opin. 900.

§ 796.—Parties.

The statutory guardian of an infant appellant may move to dismiss his appeal, since he has the power to control the ward in taking and prosecuting an appeal, especially where the interest of the ward does not conflict with the action of the guardian.

Patterson v. Million's Admx., 11 Ky. Opin. 434.

§ 803. Effect of dismissal.

Parties to a cause which is stricken from the docket upon the order of the court are out of court; the effect of such order being the same as if the appeal had been dismissed.

Vassam v. Hamilton, 8 Ky. Opin. 842.

§ 804. Plea in abatement.

The three years' limitation which bars an appeal to this court must be presented by a plea and can not be made available by being incorporated into a brief.

Boyd v. Thomas, 8 Ky. Opin. 460.

The Court of Appeals, on its own motion, may give appellee time in which to file a plea of the limitations barring an appeal after three years.

Boyd v. Thomas, 8 Ky. Opin. 460.

XVI. REVIEW.**(A) SCOPE AND EXTENT IN GENERAL.****§ 829. Rehearing.****§ 830.—In general.**

A petition for a rehearing will be overruled where nothing is urged that was not fully presented and considered at the original hearing.

Shinkle v. City of Covington, 13 Ky. Opin. 889.

Although no response is filed to a petition for a rehearing it is the duty of this court to determine the questions raised by it.

Boyd v. Tabb, 13 Ky. Opin. 1008.

§ 836. Power of appellate court in general.

The Court of Appeals can not take notice of any paper which does not constitute a part of the record before it.

Weller v. Weller, 7 Ky. Opin. 549.

Before the Court of Appeals can revise the judgment of a trial court, one of the parties must, within the prescribed time, file in the clerk's office an authenticated copy of the record.

Second Nat. Bank of Louisville v. Nat. State Bank, 7 Ky. Opin. 730.

§ 837. Matters of evidence considered in determining question.

Exceptions to evidence not made grounds for a new trial, pursuant to Civ. Code, § 372, will not be considered by the Court of Appeals.

Gum v. Adams & Co., 8 Ky. Opin. 403.

§ 838. Questions considered.

The Court of Appeals can not prejudge matters not presented to it on appeal.

Rhodes v. Gillispy, 6 Ky. Opin. 321.

An objection to the insufficiency of a petition, in the failure to allege that the plaintiffs were the holders of the bills sued on, may be made on appeal.

Blaydes v. Glum & Sons, 3 Ky. Opin. 706.

The Court of Appeals can not review matters not raised by the issues and not adjudged by the trial court.

Bradburn v. Warnock, 6 Ky. Opin. 317.

The Court of Appeals can not pass on instructions which are not in the record.

Buchanan & Rodgers v. Austin, 6 Ky. Opin. 47.

§ 839.—Scope of inquiry in general.

The Court of Appeals will determine causes on what the record discloses, and can not decide a case upon a record made up after the appeal is taken, on a mere suggestion of counsel that it was a defective record.

Parsons v. Parsons, 10 Ky. Opin. 648.

When the commissioner who is appointed to and does make a sale of real estate is not a party to an appeal, the question whether the allowance made for his services is too high can not be considered.

Perry v. Torian, 12 Ky. Opin. 358.

§ 844. Review dependent on mode of trial in lower court.**§ 846.—Trial by court in general.**

A master or trial court, having heard the evidence and observed the witnesses and their manner of testifying, is in a better position than the judges of an appellate court to make a proper estimate of its value, and the Court of Appeals will not disturb their findings on the weight of the evidence.

Elder v. Procise, 9 Ky. Opin. 450.

(B) INTERLOCUTORY, COLLATERAL AND SUPPLEMENTARY PROCEEDINGS AND QUESTIONS.

§ 868. Power to review in general.

Without a complete transcript of a case, the Court of Appeals can not review it, but must presume that it was correctly decided.

Morgan County Court v. Turner & Bro., 7 Ky. Opin. 567.

(C) PARTIES ENTITLED TO ALLEGE ERROR.

§ 880. Error affecting only co-party.

The question of whether in a joint suit against executors, and the same parties as individuals, the court below should dismiss the cause against them as executors, can not be raised in the appellate court on appeal by them in their individual capacity, no judgment having been rendered against them as executors below.

White v. Bayne, 2 Ky. Opin. 572.

§ 881. Estoppel to allege error.

§ 882.—Error committed or invited by party complaining.

An appellant can not complain of an instruction given at his request, and the fact that a similar one is given at the request of the defendant affords no ground for a reversal, even though erroneous.

Semple v. Hill, 10 Ky. Opin. 925.

(D) AMENDMENTS, ADDITIONAL PROOFS, AND TRIAL OF CAUSE ANEW.

§ 885. Amendment of proceedings of lower court.

A judgment by a justice of the peace in an action for trespass can only be corrected on appeal from the justice court to the proper tribunal, and not by objection in the Court of Appeals that judgment was void.

Obst v. Kohnhorst, 2 Ky. Opin. 569.

§ 892. Trial de novo.

§ 893.—Cases triable in appellate court.

A judgment against a nonresident, constructively summoned, can not be

disturbed where he did not proceed to reopen the case on appeal.

Nicholas v. Oldham, 2 Ky. Opin. 33.

An appeal to the circuit court from an election contest board must be tried de novo, and it is not required that the appeal be taken to the circuit court by bill of evidence and bill of exceptions, as no such method of appeal from such a board is prescribed by law.

McIlvoy v. Selecman, 6 Ky. Opin. 557.

(E) PRESUMPTIONS.

§ 900. Nature and extent in general.

Where in a suit for settlement of accounts between two firms, a contrariety of evidence as to terms of the contract is shown, after submission to a commissioner, who reported the same amount due, as a receipt given in settlement, formerly, the judgment of the lower court thereon will not be disturbed.

Seay & Burnley v. Hopkins, Smith & Co., 3 Ky. Opin. 298.

The action of a lower court is presumed to be correct, until the contrary is made to appear, and everything necessary to sustain the judgment will be presumed which is not inconsistent with the facts stated in the record.

Callahan v. Brannin, 4 Ky. Opin. 328.

Where the record does not show that there was a trial in the court below, so that it can not be inferred whether the allegations of the value of rent had been exclusively relied upon in determining the amount of the judgment, we must conclude that the requirements of section 153, Civil Code, have not been complied with.

Cox v. Winston, 1 Ky. Opin. 336.

§ 902. Matters shown by record.

Where it is admitted that orders as to the appointment of an executor and the execution and acceptance of a bond are to be found in the order book of the court, their authenticity will be presumed, and it will also be

presumed that the proceedings were read as required before being signed.

Day v. Grady, 7 Ky. Opin. 603.

Whether a court performed its duty must be tested by the record and not by extraneous evidence, and will be presumed to have done what the law imperatively required.

Curd's Exrs. v. Curd, 4 Ky. Opin. 24.

§ 905. Proceedings not included in record.

Where the record on appeal does not disclose how a trial court ruled on a question of law, the Court of Appeals will presume the ruling to be correct, and when it is not shown what ruling, if any, was made on a warranty set up as a counterclaim by the defendant, the court will presume that the plaintiff was liable on his warranty, and that the court deducted as damages what it thought were recoverable.

Brand & Co. v. Ruhl, 10 Ky. Opin. 382.

§ 906. Facts or evidence not shown by record.

Where it is insisted that the contract for retainer was champertous and void, and the record contains no allegation to that effect, and there is no attempt to prove such illegality, this court will not presume champerty, nor infer it without strong proof.

Payen v. Munger, 1 Ky. Opin. 388.

Where the law and facts were submitted to the court without the intervention of a jury, and "the court being advised," etc., it is adjudged, etc., the recital clearly implies that a trial by jury was waived and the facts as well as the law submitted to the court, and it will be presumed that every fact was proven necessary to authorize the judgment.

Ledwidge v. Shirt, 2 Ky. Opin. 457.

Where the original books, papers, etc., used on a trial of a case have been destroyed by fire, the appellate court can not take judicial cognizance of the same and the bill of exceptions will be treated as if such evidence

has been entirely omitted, no copies thereof appearing to have been made.

Macklin v. Ward, 3 Ky. Opin. 108.

Where the record does not show by bill of exceptions or otherwise the evidence heard by the court, the Court of Appeals will presume from the face of the judgment that the facts authorize the judgment.

Hallam v. Cline, 4 Ky. Opin. 585.

Where there is no bill of exceptions in the record, the Court of Appeals will presume that the judgment was based on sufficient evidence.

Settles v. Cotton's Admr., 5 Ky. Opin. 762.

§ 907.—In general.

In the absence of a bill of exceptions, the Court of Appeals must presume that the ruling of the court below in refusing to quash the deposition was correct.

Knight v. Turner, 6 Ky. Opin. 593.

The Court of Appeals must presume that an emergency existed for the suspension of a rule and adoption of an improvement ordinance on the first reading, and that the proposition to suspend the rule received the requisite number of votes, in the absence of a contrary showing.

Ballard v. Giles & Monahan, 6 Ky. Opin. 378.

Where the evidence is not in the record, the Court of Appeals must presume that it was such as to authorize the finding of the jury.

Elstan v. Roberts, 7 Ky. Opin. 16.

Where both the affidavit and bond in attachment have reference to a pending action, and the petition was sworn to on September 16, and the affidavit and bond were executed on the sixth of the same month, the Court of Appeals will assume, in the absence of any date to the filing of the petition, that it was filed when the affidavit and bond were filed.

Stark & Co. v. Lewis & Nesbit, 7 Ky. Opin. 711.

Where the clerk certifies on appeal that the copy of the orders of the court is a full and complete copy of

all the orders made in a cause, and since they could not be orders until signed by the judge, the Court of Appeals will assume that the clerk's certificate is correct, and that such orders were duly signed.

Johnson v. Dearen, 9 Ky. Opin. 272.

The Court of Appeals has no power to reverse a judgment except for errors appearing in the record, and where the record on appeal fails to show affirmatively the infancy of a party, the court can not indulge the presumption that she was an infant.

Patterson v. Million's Admx., 11 Ky. Opin. 865.

When a power of attorney and a deed from the attorney in fact are rejected as evidence in the trial court, and are not made a part of the record on appeal, the Court of Appeals will presume that their exclusion was proper and that the court did not err by excluding them.

Hampton v. Lashley, 11 Ky. Opin. 865.

In the absence of the evidence, unless the trial court's error is shown by the pleadings or record in such a way that the evidence could not, no matter what its character might be, authorize a different result, it will be presumed that the court instructed the jury to find for the defendant because the essentials of plaintiff's averments were not proved, and that no proof to sustain the action, in any respect, was introduced before the jury.

Sweeney's Admr. v. Pennsylvania Co., 12 Ky. Opin. 108.

§ 915. Pleading.

Where the original answer was demurrable, and the demurrer thereto was overruled, and an amended answer was filed, but not brought into the record, the Court of Appeals will presume that it cured the defects in the original answer and constitutes a valid defense.

Cooper & Burns v. Pennington, 7 Ky. Opin. 660.

Where no formal disposition of demurrer appears to have been made by

the court below, it will be regarded by the appellate court as overruled, and a party complaining can avail himself of that fact on appeal.

Austin v. Bullitt, 3 Ky. Opin. 47.

An order striking out all claims of set-off relied on by the parties, which purport to have been made by joint consent, will be upheld on appeal, in the absence of a motion in the lower court to set it aside.

Shackleford v. Landrum, 5 Ky. Opin. 432.

§ 917.—Demurrers.

In the absence of a bill of exceptions incorporating an amended petition, this court will presume that the court below decided correctly in refusing to permit it to be filed.

Wilson v. Elliott, 1 Ky. Opin. 537.

§ 920. Interlocutory orders and proceedings.

The action of the trial court in refusing a continuance will not be disturbed except for an abuse of discretion.

Heinrich v. Booker, 8 Ky. Opin. 811.

§ 926. Admissibility and reception of evidence.

Where depositions are read without exceptions, on the trial of the case below, this court will presume that the witnesses resided more than thirty miles from the court house.

Halcom v. Hall, 1 Ky. Opin. 404.

§ 928. Instructions.

The Court of Appeals can not consider instructions given below where the bill of exceptions does not show that any objections to them were made by the appellant, since the code of practice requires both an objection and an exception.

Riggs v. Waitlow, 10 Ky. Opin. 567.

§ 931. Findings of court or referee.

The finding of the court in an ordinary action submitted to the court, without a jury, is entitled to the same consideration as the verdict of a jury.

Grafton Med. Co. v. Wilson, 6 Ky. Opin. 518.

§ 934. Judgment.

Where the clerk's certificate shows that a part of a deposition is missing from his office, and hence not included in the record, the Court of Appeals will presume that the judgment below is correct.

Boothe v. Shrout's Admr., 8 Ky. Opin. 61.

Where letters are introduced as evidence, and the record on appeal only discloses a part of such letters and portions of each, the Court of Appeals will presume that, as the whole of such letters was before the trial court, they authorized the judgment rendered.

Duncan v. Duncan, 10 Ky. Opin. 880.

When the trial court has a discretion in a matter of practice, that discretion will not be interfered with, unless it appears to have been grossly abused to the prejudice of the substantial rights of the party complaining.

McClymond v. Gay, 10 Ky. Opin. 888.

Where papers are filed and read in evidence they should be copied on an appeal to this court, but where they are omitted from the record the presumption must be indulged that they sustain the judgment of the court below.

Tutt v. Kincaid, 11 Ky. Opin. 310.

§ 938. Making and contents of bill of exceptions, case or statement of fact.

Where no exceptions were taken by appellant to the opinion of the court in overruling his exceptions to the commission's report of the settlement of the estate, and in the absence of a bill of exceptions, showing that the claim was properly verified and proved, it will be presumed that the court adjudged correctly.

Smith v. Warth, 5 Ky. Opin. 269.

Where no exceptions are found in the record, and it does not appear that the court below acted on the exceptions, if filed, the presumption is that the exceptions were waived.

Carter v. Crady's Admr., 1 Ky. Opin. 75.

(F) DISCRETION OF LOWER COURT.**§ 959. Amended and supplemental pleadings.**

The refusal of the court to permit the filing of an answer at a succeeding term of court after a pro confesso had been permitted, is not such an abuse of discretion as to authorize a reversal.

Bell v. Sanders' Admr., 4 Ky. Opin. 464.

§ 970. Reception of evidence.

Where the bill of exceptions fails to show what response was expected from the witness, this court can not say that the appellant has been prejudiced by the action of the court in refusing to allow the witness to express his opinion, in absence of a statement by counsel to the court of what they hoped to prove by the witness, and that should have appeared in the bill.

Cain v. Commonwealth, 10 Ky. Opin. 215.

§ 983. Proceedings after judgment.

The failure of the court in its judgment to fix the time and place of the sale of the land is not an available ground for a reversal; and under § 405 of the code, which applies to the sale of real estate, no limitation of the power of the court is imposed.

Harris v. Field's Ex'x, 5 Ky. Opin. 559.

(G) QUESTIONS OF FACT, VERDICTS, AND FINDINGS.**§ 987. Power and duty to review.**

The verity of the record of the oath of office of a regular judge and of a special judge, can not be considered by the Court of Appeals, where it is made to appear only in the brief of counsel.

Henderson v. Adams, 6 Ky. Opin. 541.

§ 998. Verdicts.**§ 999.—Conclusiveness in general.**

Although conflicting evidence may, when carefully scrutinized, preponderate against a verdict, a second verdict will not be set aside on that account.

Cook v. Cantrill, 4 Ky. Opin. 179.

Where the evidence is conflicting it is the province of the jury to decide which side has the preponderance, and the Court of Appeals has no power to interpose, after the court below has refused to do so.

Fortune, Trustee v. Small, 3 Ky. Opin. 500.

Where there is an apparent diversity in the evidence the Court of Appeals will not disturb the verdict of twelve jurors who saw and heard the witnesses.

Davis v. Steinberger's Admr., 3 Ky. Opin. 504.

It is the province of the jury to decide on which side the evidence preponderates, and their findings will not be disturbed.

McAlister v. Patterson, 3 Ky. Opin. 377.

Where the evidence is conflicting and the jury has been properly instructed, their finding will not be disturbed.

McIlvain v. Day, 3 Ky. Opin. 591.

Where the evidence is conflicting, it is the province of the jury to weigh and determine the facts, and unless their finding is clearly and palpably against the weight of the evidence, the appellate court will not interfere.

Carson v. Thompson, 3 Ky. Opin. 65.

Where the findings of the jury are not palpably against the evidence, a new trial will not be awarded after it was refused by the court below.

Wade v. Harvey & Keith, 3 Ky. Opin. 120.

The cause having been twice tried by a jury and in each instance the verdict was adverse to the appellant, the Court of Appeals will not reverse the judgment, except for errors of law occurring on the trial in the court below.

Johnson v. Mullen, 5 Ky. Opin. 561.

If the finding of a jury is not palpably wrong, a reversal can not be had upon the sole ground that the evidence preponderates against the verdict.

Reed v. Martin, 5 Ky. Opin. 564.

The Court of Appeals will not reverse a second judgment against the validity of a will, where the evidence as to the capacity of the testator and the undue influence over her is conflicting, especially when it is in accord with the judgment of the county court.

Shanklin v. Overby, 5 Ky. Opin. 763.

Where no legal question is involved, and there is not a preponderance of evidence against the verdict, the Court of Appeals is not authorized to reverse the case.

Graves v. Gibson, 5 Ky. Opin. 695.

Where there is evidence upon which to base a verdict, the Court of Appeals will not disturb it, unless it is palpably against the weight of the evidence.

Botts v. Tyree, 5 Ky. Opin. 88.

The verdict of a jury, trying an issue out of chancery, is entitled to as much weight as a verdict in a common-law action.

Goode's Admr. v. Blackwell, 5 Ky. Opin. 692.

§ 1001.—Sufficiency of evidence in support.

Where a part of the evidence accepted and allowed by the court is inadmissible and should have been rejected, but still if all of such improper evidence had been stricken out there would still be enough to support the judgment, the error of admitting such evidence can not be held to be prejudicial to appellant.

DeLafield v. City of Bowling Green, 11 Ky. Opin. 71.

The trial jury who have an opportunity to note the eye, tone and facial expression, countenance, and whole bearing of the witnesses can form a more correct idea of the value to be placed upon their credibility than can the Court of Appeals, and this court will not reverse on the mere weight of the evidence.

Louisville, C. & L. R. Co. v. Ramsey, 11 Ky. Opin. 274.

The Court of Appeals will not reverse a cause because of insufficient evidence to sustain a verdict where all

of the evidence in the case is not in the record.

Israel v. Louisville Jockey Club & Driving Park Assn., 12 Ky. Opin. 593.

§ 1002.—On conflicting evidence.

Where the evidence was strangely conflicting upon a question involving the issue of fact and fairly presented by proper instructions for appellants, none being asked by appellee, the appellate court can not interpose and set aside the finding of the jury after the court below refused to do so, without overturning a doctrine and departing from a principle thoroughly settled in this court and the courts of other states.

Billings v. Montizriffe, 1 Ky. Opin. 479.

Where the testimony is conflicting, the verdict of a jury will not be disturbed if favorable to either party, and the same rule applies where the issues of fact have been determined by the chancellor (being purely legal), and his judgment will be treated as the verdict of a jury properly instructed.

Vandegrift's Admr. v. Davezac, 12 Ky. Opin. 91.

§ 1003.—Against weight of evidence.

Where an issue of fact is presented to a jury under proper instructions from the court, and a verdict rendered, even if the weight of the testimony might appear to the Court of Appeals to have been with the losing party, such verdict will not be disturbed.

Booth v. Smith, Mitchell & Co., 9 Ky. Opin. 483.

The Court of Appeals will only reverse the finding of the lower court on the evidence when it is palpably against the evidence.

Scott v. Scott's Exrx., 10 Ky. Opin. 283.

Where issues are joined and a trial had before the trial judge, who knew and had an opportunity to observe the witnesses, and who renders a judgment, it will not be disturbed by this court simply because on the face of the record the weight of the evidence

seems to be against the finding of the trial court.

Dickey v. Salmons, 10 Ky. Opin. 378.

The Court of Appeals will not disturb the verdict of a jury where there is some evidence to sustain it, even though the court may think the weight of the evidence the other way.

Cincinnati Southern R. Co. v. Daugherty, 10 Ky. Opin. 438.

The Court of Appeals will not disturb a verdict or finding on the weight of evidence, and when an issue is formed and submitted, and there is proof on both sides, and when the trial court or jury has passed on the facts and arrived at a verdict or finding, the Court of Appeals will not interfere to reverse.

Lowe v. Erleinson, 11 Ky. Opin. 57.

Where a verdict is flagrantly against the evidence, this court will reverse, but not otherwise.

Ryan v. Kanella, 13 Ky. Opin. 740.

The Court of Appeals will not reverse unless the verdict is clearly and palpably against the evidence.

Chicago, St. L. & N. O. R. Co. v. Coffee, 13 Ky. Opin. 823.

§ 1006.—Successive verdicts.

Where a cause has been twice tried and each time has resulted in a verdict for an appellee, the Court of Appeals will not disturb such verdict, unless rendered in flagrant disregard of the law and the evidence.

English's Admr., v. Cropper, 9 Ky. Opin. 233.

The Court of Appeals will not disturb a verdict for plaintiff, where, on the same state of facts, two other juries have returned verdicts for the plaintiff.

Louisville &c. R. Co. v. Brown, 11 Ky. Opin. 199.

§ 1007. Findings of court.

§ 1008.—Conclusiveness in general.

Where the proof is conflicting, and the law and facts have been submitted to the court, the judgment will not be disturbed, unless the judgment

is palpably against the weight of the evidence.

Yager v. Sale, 5 Ky. Opin. 325.

If the law and facts be submitted to and tried by the court, a judgment rendered thereon is entitled to the same weight as the findings of a jury, and if contrary to the weight of the evidence the judgment will be reversed.

Slavin v. Dunn, 4 Ky. Opin. 231.

Where the law and facts are submitted to the circuit judge, the Court of Appeals will not reverse unless the conclusion of the court is flagrantly against the evidence.

Bowman v. People's Exr., 5 Ky. Opin. 189.

Where the law and facts are submitted to the court, it acts in the double capacity of judge and jury, and its finding is entitled to the weight of the verdict of a jury, which will not be disturbed unless palpably against the evidence.

Chamberlain & Tapp v. Brewer, 5 Ky. Opin. 6.

A finding of the court without the intervention of a jury has the force and effect of a verdict on appeal to the Court of Appeals.

Daniels v. Bayles, 7 Ky. Opin. 264.

Where, by consent of the parties, the law and the facts are submitted to the judge, his findings on the facts will be treated as the verdict of the jury.

Jordan v. Wallace's Admr., 7 Ky. Opin. 480.

§ 1009.—Effect in equitable actions.

In an action at law on a note, where no equitable defense is pleaded, parties are entitled to a trial by jury, and where such a suit is transferred to equity on appellant's motion over the appellee's objection and exception, the judgment of the court must be considered as standing in the place of the verdict of a properly instructed jury, and will not be disturbed unless flagrantly against the weight of the evidence.

Threldkeld v. Davis, 10 Ky. Opin. 240.

§ 1010.—Sufficiency of evidence in support.

The law does not permit the Court of Appeals to assume the functions of the jury and weigh evidence, and it will not reverse where the evidence is not flagrantly or overwhelmingly against the finding.

Urso & Morsican v. Unverzagt & Smith, 11 Ky. Opin. 46.

In an action at law, where a jury is waived and submission is to the court, its judgment will not be disturbed unless it is palpably against the evidence.

Gentry v. Abshire, 11 Ky. Opin. 81.

Even though the evidence is sufficient to sustain a judgment, such judgment will be reversed where there was no pleading filed upon which the judgment could stand.

Stein v. Grotenkemper, 12 Ky. Opin. 39.

Where the issue is a purely legal one, and the court below has passed upon the evidence and found it insufficient to support the claim, such finding not being flagrantly against the weight of the evidence, will be held conclusive and will not be disturbed.

Commonwealth v. Chevis, 12 Ky. Opin. 47.

§ 1011.—On conflicting evidence.

The Court of Appeals will not disturb a judgment upon conflicting evidence.

Alexander v. Newell, 6 Ky. Opin. 135.

Cheatham v. Northwestern Mut. Life Ins. Co., 6 Ky. Opin. 58.

Where the evidence is conflicting and nearly balanced, the Court of Appeals will not disturb the judgment on the evidence.

Davies v. Cantrill, 7 Ky. Opin. 99.

Louisville & N. R. Co. v. Bush, 7 Ky. Opin. 572.

When the evidence is conflicting the Court of Appeals will not disturb the judgment on that account.

Porter, Guardian, v. Neal, 8 Ky. Opin. 111.

Where the evidence is conflicting and has been passed upon by the court and jury, the Court of Appeals, unless manifest injustice has been done, will not interfere.

Abert v. Berry, 8 Ky. Opin. 343.

§ 1016. Findings of referee, master, commissioner, or auditor.

§ 1017.—Conclusiveness in general.

A finding by a commissioner, approved by the chancellor, charging a party at the rate of \$7 per day for the use of a two-horse team used for hauling in the city of Louisville, is so excessive and unreasonable as to warrant the court in reversing a judgment based upon it.

Graham v. Jones, 11 Ky. Opin. 503.

(H) HARMLESS ERROR.

§ 1025. Prejudice to rights of party as ground of review.

§ 1026.—In general.

Where, from the affidavits, etc., of appellants, it is not shown that they were prejudiced by the judgment below, it can not be reversed on appeal.

Doom v. Doom, 3 Ky. Opin. 441.

The errors, if any exist in the judgment in favor of the appellant against W., which is not appealed from, held not to result from anything in the pleadings or preparation of the case, which could operate to estop the appellant from seeking a reversal of the judgment, so far as it directs the payment of the claim of W. against the appellant.

Yarnall v. White, 4 Ky. Opin. 291.

Where the only error is in the adjudged balance of \$29.00 and the accumulated cost on each side would necessarily exceed the amount in controversy the Court of Appeals will not reverse the case.

Beckwith v. Lambert, 5 Ky. Opin. 77.

It does not appear from the petition that the judgment was rendered by mistake, but was the judicial determination of the court; and whether it was right or wrong could only appear from the proceedings as reproduced in the subsequent suit; and un-

less that preliminary object was effected, with at least reasonable certainty, neither the circuit court nor the Court of Appeals should disturb the judgment.

Deshong v. Cain, 5 Ky. Opin. 629.

It is immaterial whether the court erred or not in giving the law to the jury, where there is no evidence to sustain a verdict, if it had been rendered for the plaintiff.

Davis v. Owsley, 5 Ky. Opin. 677.

A defendant is not prejudiced by an order discontinuing the plaintiff's case as he may proceed to trial on his counterclaim as if no order of discontinuance had been entered.

Campbell v. Evansville &c. Railroad Co., 5 Ky. Opin. 188.

Where the evidence preponderates in favor of the finding of the jury, the Court of Appeals will not reverse for a mere technical or verbal error.

Spradling v. Coyzens, 5 Ky. Opin. 282.

A party not prejudiced by the judgment has no cause of complaint.

Buckley v. Board, 8 Ky. Opin. 16.

§ 1031. Presumption as to effect of error.

Where the amount of damages assessed indicates that the jury must have acted under the influence of passion or prejudice, and such fact was recognized by the appellee, and upon the suggestion of the court, consented that a judgment should be entered for two-fifths of the damages assessed, when it appears that the jury were influenced by passion or prejudice in the assessment of damages, it may readily be concluded that the same cause influenced them in determining whether or not the appellee was entitled to recover at all.

Abbott v. Lewis, 5 Ky. Opin. 230.

§ 1033. Errors favorable to party complaining.

Where a litigant asks for an instruction, which is given by the court, he can not afterwards complain, although it is erroneous.

Prather & Smith v. Willson & Co., 4 Ky. Opin. 249.

Where all the papers in a case show no error against a plaintiff, but that all evidence objected to by him was rejected, and all instructions asked for given, it is error for the trial court to set aside the verdict of the jury and grant a new trial.

Creel's Admr., v. Hill & Roy, 4 Ky. Opin. 359.

Where a judgment is against one defendant only the other defendants can not complain thereof on appeal.

Apperson's Admr. v. Apperson's Exrx., 12 Ky. Opin. 289.

§ 1038. Pleading.

§ 1039.—In general.

An apparent variance between the prayer of the petition and the verdict of the jury is a mere error or defect in the proceedings which does not affect the substantial rights of the defendant.

Martin v. Trustees of Baptist Education Society, 4 Ky. Opin. 283.

§ 1046. Conduct of trial or hearing in general.

Where a judgment has been reversed, and on trial of the consolidated cause in the court below, the overruling of a motion of the plaintiff to strike out the attachment proceeding of the creditors whose judgments were thus reversed, can not prejudice the plaintiff's rights, since upon the overruling of such motion the court could not revive the reversed judgments.

Beazley v. Mershon, 3 Ky. Opin. 21.

The Court of Appeals will not reverse a cause on the ground of an improper argument made in the trial of the cause by an attorney unless the argument amounts to a flagrant abuse of the privilege the attorney had in presenting his client's cause.

City of Covington v. Glennon, 11 Ky. Opin. 9.

§ 1049. Admission of evidence.

Where the verdict is fully sustained by evidence and the verdict would have been the same if the evidence complained of had been rejected, the error is a harmless one.

Mitchell v. Whitmore, 4 Ky. Opin. 433.

Defendant had the right to have his answer to the petition submitted with it to the jury; and, while it does not appear that the verdict resulted from the withholding his pleadings, still his right to have them before the jury was invaded, and injury may have resulted therefrom and a fair trial prevented.

Robinson v. North, 5 Ky. Opin. 514.

The admission of objectionable evidence is not of itself sufficient to disturb the verdict of a jury, where the verdict would have been in accordance with the weight of the testimony if that had been excluded.

Sanford v. Hall, 5 Ky. Opin. 287.

§ 1050.—Prejudicial effect in general.

A special examination as to the character of a witness, no matter how illegal it may have been, is not reversible error, where the witness has been thoroughly discredited and no effort was made to sustain his character.

Shelby v. Mock, 7 Ky. Opin. 257.

An error in the admission of evidence will not be ground for reversal, when there is nothing to indicate that it was injurious to appellant.

Lynch v. Stapleton, 12 Ky. Opin. 119.

§ 1057.—Facts otherwise established.

Refusal to permit exhibits of a petition to be read to the jury by plaintiff was not prejudicial to plaintiff, where the answer admits all that the exhibits would have shown if they had been produced.

Grimes v. Trimble, 6 Ky. Opin. 763.

§ 1062. Submission of issues or questions to jury.

An essential error in the response of the court to the inquiry of the jury, or the failure of the court to answer directly the questions propounded by the jury, if proper exceptions are taken, is an available error.

Yates v. Hambrick, Jr., 5 Ky. Opin. 320.

§ 1063. Instructions to jury.

§ 1064.—Prejudicial effect in general.

A cause will not be reversed on ac-

count of an instruction not entirely correct where such an instruction did not prejudice the substantial rights of the appellant.

Bramel v. Cunningham, 11 Ky. Opin. 409.

It is not reversible error for the trial court to refuse to give an instruction offered, where the court by another instruction gives the substance of that contained in the refused instruction.

Montfort v. Hanna, 12 Ky. Opin. 475.

§ 1069. Conduct and deliberations of jury.

It is not matter for review in this court that the jury were permitted to temporarily separate.

Peters v. Commonwealth, 13 Ky. Opin. 204.

§ 1073. Judgment or order.

Where in a trial the court gave to one litigant a prior lien over a third litigant, who does not complain thereof or appeal therefrom, other parties in said cause have no right on appeal to complain of the judgment not against them.

McCall v. Bruce, 12 Ky. Opin. 257.

(K) SUBSEQUENT APPEALS.

§ 1097. Former decision as law of the case in general.

The Court of Appeals has no power, on a second appeal, to correct an error in the original judgment which either was, or might have been relied upon in the first appeal.

McAllister's Admr., v. Commonwealth, 4 Ky. Opin. 178.

The Court of Appeals has not the power to revise its former decision, whether it be right or wrong, but such court as well as the circuit court, is bound to recognize it as the law of the case.

Abbott v. City of Newport, 5 Ky. Opin. 76.

There was no proof taken in this case after its return to the lower court, and as the judgment appealed from conforms to the opinion then

rendered, the judgment must be affirmed.

Lansdale v. Beall's Heirs, 5 Ky. Opin. 446.

On the second appeal the law as expounded on the first must prevail as to the questions involved.

Guthrie's Exrs. v. Stevens, 5 Ky. Opin. 360.

The former decision of the Court of Appeals must be regarded as final as to all questions involved in this controversy except such issues as are raised by the amended petition filed after the return of the case to the chancery court.

Howard v. McCollum, 5 Ky. Opin. 537.

Where an item was involved in former litigation, constituting one of the errors assigned, even if a clerical misprision, this court having passed upon it at the instance of appellant, it constitutes a complete bar to any other appeal for the same excuse.

Coakley's Admr. v. Coakley, 11 Ky. Opin. 182.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(A) DECISION IN GENERAL.

§ 1100. Necessity of decision.

Where the record shows that appellant obtained everything he asked for in the court below, he is entitled to no relief, as he has nothing to complain of.

Hawkins v. Parker, 6 Ky. Opin. 637.

§ 1115. Scope and extent of relief.

§ 1116.—In general.

A judgment of sale of a decedent's land was reversed, where there was unapplied assets in the hands of the administrator, and there was no showing as to their insufficiency.

Dugan v. Griffith, 7 Ky. Opin. 651.

(B) AFFIRMANCE.

§ 1128. On hearing in general.

Where the evidence in a trial to recover on a forfeited recognizance is conflicting, the Court of Appeals will

affirm the judgment of the lower court, for when the law and evidence is submitted to the trial court his finding has the same effect as the verdict of a jury.

O'Daniel v. Commonwealth, 8 Ky. Opin. 125.

§ 1133. Insufficient presentation of case or questions.

In an appeal from a judgment sustaining a motion for a nonsuit, if the appellant fails in his bill of exceptions to bring to this court all of the evidence in the case, this court has no authority to review the judgment below, and hence will affirm it.

Haggard v. Louisville C. & L. R. Co., 13 Ky. Opin. 987.

§ 1134. Error not shown.

Where the record on appeal does not contain an amended reply, neither the instructions nor a deposition alleged to have been improperly read to the jury, and from the evidence before the court, it can not be said that the findings of the jury are not in accordance with the preponderance of the evidence, the judgment will be affirmed.

Brown v. Young's Admr., 7 Ky. Opin. 737.

Where the evidence is conflicting and the question of fact has been submitted to the jury with proper instructions, if the weight of evidence is against the verdict, this court will not interpose after a motion for a new trial has been refused by the court below.

Frankfort & Lawrenceburg Tpk. Co. v. Herndon's Exr., 1 Ky. Opin. 226.

Where the evidence conduces to prove the fraudulent transfer of property for the purpose of preferring creditors, and the wilful appropriation of the assets of a defendant to his own personal use, at a time when he was fully aware of his insolvency, it will justify an attachment by the creditors, and a decree of the chancellor setting aside such fraudulent transfers of property by defendant will not be disturbed.

Levy v. Ullman & Co., 2 Ky. Opin. 208.

Where there is no error in giving or refusing instructions or in admitting or rejecting testimony the judgment will be affirmed.

Hargis v. Moore, 3 Ky. Opin. 430.

§ 1140. Remission of part of recovery.

A remittitur of the excess, when application is made by the defendant for an injunction to prohibit collection of the judgment, will not cure the defect and render it unnecessary for the judgment to be reversed.

Engleman v. Central National Bank of Danville, 3 Ky. Opin. 132.

§ 1145. Effect of affirmance.

The legal effect of an affirmance of a judgment by the Court of Appeals is that there is no error, clerical or judicial.

Davis v. Powell, 3 Ky. Opin. 420.

(C) MODIFICATION.

§ 1146. Power to modify judgment or order.

The Court of Appeals can not modify a judgment at a subsequent term of the court.

Wile v. Sweeney & Taylor, 4 Ky. Opin. 278.

§ 1152. Modifying provisions of judgment or order.

An opinion of the appellate court, revising a judgment below, implies that the litigants shall have a reasonable time to comply with the mandate and discharge the order.

Musgrave v. Powell, 4 Ky. Opin. 23.

(D) REVERSAL.

§ 1156. On motion.

Where a party has shown no diligence in preparing for trial, but submits his cause and is defeated, this court is not authorized to reverse the judgment for further preparation.

Begley v. Duff, 13 Ky. Opin. 755.

§ 1157. On hearing in general.

A judgment for the sale of land will be reversed, when neither the judgment nor the petition upon which

it is rendered contains a description of the land.

Crabtree v. Rosenfield, 8 Ky. Opin. 125.

Where there is a bad answer to a bad petition, the judgment will not be reversed at the instance of the party who first committed error in his pleadings.

Haynes v. Bolin, 8 Ky. Opin. 133.

§ 1158.—Determination on merits.

The Court of Appeals is bound by the statute to give to the verdict of a jury the same effect as is given to verdicts in other than will cases and will not reverse the findings of the jury, unless flagrantly or palpably wrong.

Stokes' Exr. v. Shippen, 9 Ky. Opin. 858.

§ 1164. Errors on part of appellant or plaintiff in error.

Though from the face of the pleadings the appellate court would affirm a judgment, where injustice might be done thereby, a reversal for a better preparation of the case below will more properly adjudicate the rights of all parties.

Feland v. Rouet, 3 Ky. Opin. 80.

§ 1166. Jurisdictional defects.

A judgment for a sum greater than is owing by the defendant, and which is a matter of adjudication, and not a clerical error, is cause for reversal.

Alcorn v. O'Bryan, 7 Ky. Opin. 708.

If a plaintiff fails to state a cause of action, it is not too late, in the progress of the trial, at any time to demur, or to move for nonsuit, or in arrest of judgment, and where a plaintiff has recovered judgment below and has failed to state facts sufficient to constitute a cause of action the Court of Appeals will reverse the judgment.

Barber v. Moore, 5 Ky. Opin. 192.

§ 1167. Nature and form of decision.

The Court of Appeals will not reverse a case for failure to grant relief which was not asked for in the trial court.

Herrick v. Herrick, 7 Ky. Opin. 527.

The Court of Appeals can not reverse a judgment of the circuit court

for failure to do that which it was not asked to do.

Ashurst v. Kinney, 7 Ky. Opin. 364.

§ 1168. Premature decision.

The fact that a case was prematurely heard is not ground for appeal to the Court of Appeals until the question has been presented and acted upon by the trial court.

Rhodes v. Gillispy, 6 Ky. Opin. 321.

Where an order was entered by the court, "It is ordered that the issue herein be set for trial on the 3rd day of the next April term," but on the same day the case was submitted to the court without due notice to appellant, it authorizes a reversal, and a new trial should be awarded.

Sharp v. Hackney, 3 Ky. Opin. 92.

The fact that a case was heard and determined before it stood for trial is not alone ground for reversal, it not appearing that plaintiff's substantial rights were prejudiced by the obtaining of the relief sought sooner than he had the right to demand.

Harper v. Peeples, 6 Ky. Opin. 457.

§ 1169. Error as to grounds of decision.

The Court of Appeals can not reverse a judgment for an error of the trial court in giving or refusing instructions, unless the ruling has been excepted to.

Curd v. Stinnett, 6 Ky. Opin. 727.

The evidence must be palpably against the verdict to authorize a reversal on the ground that the verdict is against the weight of the evidence.

McGinnis v. Howard, 2 Ky. Opin. 458.

Before a judgment can be rendered on a suit for breach of warranty, proof of the alleged warranty must be shown, and without same, a judgment by default will be reversed.

Brotherton v. Megill, 3 Ky. Opin. 121.

A judgment will be reversed where an instruction restricts the inquiry to the isolated facts.

McAlister v. Patterson, 3 Ky. Opin. 377.

Where on the appeal, the facts show that justice does not appear to have been done according to the evidence, the judgment will be reversed.

Burgess v. Hutchison, 3 Ky. Opin. 687.

A judgment may be reversed on the sole grounds that the verdict of the jury ought not to have been sustained by the court.

Chrany v. Hicks, 5 Ky. Opin. 73.

Where the judgment exceeds the amount laid in the petition it will be reversed and remanded with directions to render judgment for the plaintiff in the court below for the amount laid in the petition, where that is the only error; but where there is ground to apprehend from irregularity on the trial that justice has not been done, the cause will be remanded for a new trial.

Robinson v. North, 5 Ky. Opin. 514.

The Court of Appeals will reverse a judgment in a case where the petition does not set out a cause of action, although defense may not have been made in the trial court.

Campbell v. Commonwealth, 6 Ky. Opin. 1.

Where a holder of a purchase-money note was made a party defendant to a suit, but was not served with process, and the judgment of sale of the land made no provision for protecting her rights, the irregularity and omission amounted to reversible error.

Tucker v. Hayden, 6 Ky. Opin. 511.

To authorize the Court of Appeals to reverse a judgment merely because a motion to submit questions of fact in an equity proceeding to a jury has been overruled, it must be made to appear that the court abused its discretion in overruling the motion.

Maloney v. St. Louis Mut. Ins. Co., 6 Ky. Opin. 495.

It is reversible error to instruct the jury that they have a right to award punitive damages in the event defendant was guilty of gross negligence,

where there are no facts warranting an instruction as to punitive damages.

Louisville & N. R. Co. v. Licking, 6 Ky. Opin. 294.

Where the evidence does not show a right of recovery against a principal on the theory that the purchaser was an agent of the principal, it was held reversible error to give an instruction based on such theory.

Lawson v. Gardner & Co., 6 Ky. Opin. 288.

The findings of the court on questions of fact without the intervention of a jury will not be disturbed on appeal unless there is a decided preponderance of the evidence against them.

Allen v. Jacobs, 6 Ky. Opin. 144.

Inconsistent and irreconcilable instructions which tend to confuse and mislead the jury are cause for reversal.

Bowling v. Martin, 6 Ky. Opin. 67.

The judgment was held to be against the decided preponderance of the evidence, and, on that account, should be reversed by the Court of Appeals.

Taylor v. Ellison, 7 Ky. Opin. 215.

Where the petition or the evidence shows that a contract is against public policy, a judgment thereon for plaintiff will be set aside on appeal, although defendant failed to plead.

Dunn v. Bradley, 7 Ky. Opin. 282.

A judgment which gives no description of the land attached to be sold, but requires the commissioner making the sale to look to the petition or other pleading for that purpose, must be reversed.

Abbott v. Letteral, 7 Ky. Opin. 470.

Error in a judgment against a sheriff, charging him five per cent. of the taxes due and owing by the taxpayers and uncollected by the sheriff, is cause for reversal.

Scott v. Commonwealth, 7 Ky. Opin. 708.

Where an action at law is submitted to the judge without a jury, the court's

finding on the facts will not be reversed, unless it be palpably wrong.

Mosby v. Hatcher, 8 Ky. Opin. 10.

A judgment will be reversed where in a sale of real estate is decreed, where the land is not described in the judgment.

Gillen v. Jones, 9 Ky. Opin. 386.

The Court of Appeals will not reverse on account of an erroneous instruction where the record fails to show that any objection or exception was taken to the giving of such instruction.

Kentucky Central Railroad v. Patton, 10 Ky. Opin. 604.

§ 1170. Technical, formal, or trivial defects or errors.

Refusal to strike out certain words as surplusage is not cause for reversal, where the ruling could not have prejudiced the rights of appellant.

Laudeman v. Gallagher, 7 Ky. Opin. 559.

Where issue has been joined and a trial had, irregularity of the pleadings will not avail on appeal.

Schloss, Gritz v. O'Hara, 1 Ky. Opin. 395.

Failure of counsel to put in a defense (no doubt resulting from casualty or accident), will not warrant a reversal where it is not alleged that appellants or their counsel were unavoidably prevented from making a defense.

Gould & Davenport v. Baird, 1 Ky. Opin. 90.

It is reversible error to take a petition against a nonresident as confessed, where he did not appear to the action, although a corresponding attorney was appointed.

Curb & Frazier v. Brent & Co., 1 Ky. Opin. 454.

Where a petition does not contain any allegation as to the value of property charged to be in the possession of the appellant, nor of the annual rents and profits, and no evidence was offered as to same, a verdict of the jury granting such rents and profits will be reversed.

McClendon v. Stewart, 1 Ky. Opin. 192.

A clerical misprision is no cause for reversal until a motion to correct has been made in the lower court and overruled.

Benningfield v. Christie, 2 Ky. Opin. 177.

A judgment will not be reversed for a clerical misprision, until the objection has been presented and acted on by the court rendering the judgment.

Stewart v. Gilbert, 2 Ky. Opin. 217.

When a petition discloses the existence of a mortgage and proposes to file it, it is in the power of the defendant to compel plaintiff to do so; but if he fails to exercise this right, or to interpose any other objection to the judgment in the circuit court, the irregularity is not a cause for reversal.

Merrifield v. Lucas, 2 Ky. Opin. 81.

The misdescription of a note is not sufficient to authorize a reversal of the case, and an error in the calculation of the interest at the time of the judgment, is a clerical misprision, which can be corrected on motion.

Rosseau & Craddock v. Mitchell, 5 Ky. Opin. 567.

The Court of Appeals will not reverse a judgment which is substantially correct, for the purpose of giving the appellant nominal damages and taxing the appellee with the cost of the litigation.

Trabue v. Lander, 6 Ky. Opin. 652.

Where the parties voluntarily submitted their case to the chancellor, his judgment will be taken as a verdict and will not be refused on account of the evidence in the case for any reason that would not authorize the Court of Appeals to set aside the findings of the jury.

United Life, Fire & Marine Co. v. Von Borles, 6 Ky. Opin. 644.

The judgment of the court in a common-law action stands on the same footing with the verdict of the jury, and will not be disturbed on appeal, unless palpably against the weight of the evidence.

Hawkins v. Lee, 6 Ky. Opin. 390.

The failure to file an amended petition at the term of court succeeding the filing of the mandate of the Court of Appeals was held not ground for reversal.

Payne v. Monk, 6 Ky. Opin. 255.

Where answers made on oath to interrogatories attached to defendant's answer, denied the existence of every material allegation of defendant's answer, the failure of plaintiff to reply to the answer is a mere formal defect and is not cause for reversal, the answer to the interrogatories being termed by appellant as a reply.

McClellan Co. v. Lyon, 6 Ky. Opin. 93.

Whether the practice complained of in a trial court was regular or irregular, it can not authorize a reversal, unless it is shown to have been prejudicial to the substantial rights of appellants.

Miller v. Pope, 6 Ky. Opin. 134.

A judgment of the trial court, which is not palpably against the weight of the evidence, will not be disturbed on appeal.

Riley v. Louisville, L. & C. R. Co., 6 Ky. Opin. 183.

Where the right to sue as assignee is admitted in one answer and denied in an amendment, without assigning some reason for making the admission in the first place, the Court of Appeals will not reverse for this alone where there is no valid defense relied on or pleaded.

Hayley v. Kiernan, 6 Ky. Opin. 193.

Where an appeal is taken and prosecuted by one whose liability was necessarily incidental to that of defendant without objection for informality or irregularity in the mode of procedure in the circuit court, the judgment will not be disturbed, where it appears that the proper result was reached.

Commonwealth v. Rice, 6 Ky. Opin. 48.

Failure to give credit on a judgment is not an available error on appeal, where the execution and officer's return showing that \$100 of the debt had

been made by sale of the property were copied into the record by the clerk without having legitimately been before the court or jury.

Bowling v. Martin, 6 Ky. Opin. 67.

Refusal of the court to transfer a cause from the equity docket to the ordinary docket where it should have been brought is not reversible error, where the motion was not made until after answer, and after all the parties are ready for submission, no abuse of discretion being shown.

Maloney v. St. Louis Mut. Life Ins. Co., 6 Ky. Opin. 270.

Where a case is submitted to the court without the intervention of a jury, the finding of the court, which is not flagrantly wrong, will not be disturbed on appeal.

Dickerson v. Trimble, 7 Ky. Opin. 525.

A verdict supported by some evidence will not be disturbed on appeal.

Sowards v. Hereford, 7 Ky. Opin. 475.

A cause in attachment can not be reversed for error where there has been no judgment rendered sustaining the attachment.

Stark & Co. v. Lewis & Nesbit, 7 Ky. Opin. 711.

A judgment will not be reversed for an error of only \$3 in allowance by a commissioner.

Eaves, Weir & Dade v. Milliken, 7 Ky. Opin. 437.

The Court of Appeals will not disturb a judgment on account of a small error in the calculation of interest, as to the period covered by the calculation, where the plaintiff had the right to demand it sooner and did demand it sooner by institution of suit.

Kentucky University v. McBrayer, 7 Ky. Opin. 300.

The Court of Appeals will not disturb a judgment based on the finding of a jury where it does not appear that the finding is palpably wrong.

Rodgers v. Flick, 7 Ky. Opin. 22.

The Court of Appeals will not disturb a judgment of partition, although

one party may have received some advantage in the allotment, where the testimony as to the value of the property is conflicting and the advantage is slight.

Mercer's Exr. v. Caldwell, 7 Ky. Opin. 58.

Where the litigation has been protracted, the Court of Appeals will consider only such errors as affect the substantial rights of the parties.

Mercer's Exr. v. Caldwell, 7 Ky. Opin. 58.

The Court of Appeals will not set aside the finding of a jury, unless it is plainly against the evidence.

Hazelrigg v. Roberts' Admr., 7 Ky. Opin. 36.

The erroneous admission of evidence of claims which appear to have been excluded in a prior settlement is not ground for reversal, as it must be presumed that the court in making up his judgment did not consider the incompetent testimony.

Bell v. Mitcherson, 7 Ky. Opin. 148.

A judgment which is substantially correct will not be reversed on appeal.

Lee v. Alexander, 7 Ky. Opin. 153.

The refusal of the court to strike out parts of a petition under some circumstances is not such an error as will affect prejudicially the substantial rights of the defendant.

Ellinger's Admr. v. Brown, 9 Ky. Opin. 514.

No reversal can be had on an instruction, even if erroneous, where the same language is used in other instructions given at the trial and not objected to.

Boyd v. Morris, 10 Ky. Opin. 758.

Where an issue of fact is submitted to a jury at three different trials, each resulting in a verdict for the appellee, before the Court of Appeals will reverse such a case there must be some palpable error committed to the prejudice of the appellant.

Morgan v. Wood, 11 Ky. Opin. 320.

The Court of Appeals will not reverse for any error of law, unless it

appears from the record that the accused has been prejudiced in his substantial rights.

Bell v. Commonwealth, 11 Ky. Opin. 336.

§ 1171. Amount or extent of recovery.

Although only one of a number of parties against whom a judgment has been rendered, appeals, the case will be reversed in its entirety if the controversy can not be rightfully adjusted without it.

Vertrees v. Rush, 2 Ky. Opin. 49.

Where the evidence shows a confusion of accounts, a verdict predicated thereon will be reversed.

Ward v. Claxon, 4 Ky. Opin. 238.

Where, by fraud or mistake the consideration expressed in a deed is much less than the purchaser is bound to pay, a judgment compelling the purchaser to accept the deed will be reversed.

Duff v. McElveney, 6 Ky. Opin. 210.

The Court of Appeals will not reverse for an error in failing to give nominal damages.

Boyd v. Camp, 10 Ky. Opin. 28.

The Court of Appeals will refuse to reverse on account of an error in the judgment, it being for \$2.10 more than was due on the note.

Grimes v. Williams, 11 Ky. Opin. 28.

§ 1173. Reversal as to one or more co-parties.

An appellant has no right to demand a reversal of a judgment against him because of the fact that it must be reversed as to another appellant.

Hamilton v. Barnes, 5 Ky. Opin. 167.

§ 1175. Rendering final judgment.

Where an appeal is taken from a judgment rendered in proceeding to probate a will the Court of Appeals will render a final judgment on reversal of the case.

Allen's Exr. v. Allen, 5 Ky. Opin. 1.

A judgment rendered in a cause submitted before preparation for trial

will, on that account, be reversed and remanded to the lower court for further preparation.

Hancock v. Brand, 1 Ky. Opin. 223.

A judgment in favor of defendant for a larger sum than alleged in his counterclaim will be reversed.

Ellis v. Richardson, 1 Ky. Opin. 349.

A mere preponderance of evidence on the side of the appellant can not be available in this court for reversal when the court below had refused a new trial on that ground.

Gray v. Morton, 1 Ky. Opin. 332.

Whatever may be our opinion as to the preponderance of the evidence, if the jury was instructed as to the law of the case, this court will not interpose and set aside their finding.

Page's Admr. v. Page, 1 Ky. Opin. 385.

If the verdict of a jury is palpably against the evidence the judgment will be reversed.

Spratt v. Adams' Ex'r, 1 Ky. Opin. 327.

A judgment more favorable to defendants than the record discloses, and from which the complainants do not appeal, will not be disturbed.

Hardin v. Clarkson, 2 Ky. Opin. 561.

Where there have been two concurring verdicts, the court of appeals will not reverse a judgment on the weight of the evidence.

Louisville & N. R. Co. v. May, 8 Ky. Opin. 116.

§ 1176. Directing judgment in lower court.

A judgment in an action against an administrator was reversed and the cause remanded with directions to allow certain claims against the estate, and to set off the same against the demands of the administrator against the claimant.

Growder's Admr. v. Prather, 6 Ky. Opin. 745.

§ 1177. Necessity of new trial.

This court will not award a new trial because the verdict is against the

weight of evidence, after the court below has refused it on that ground.

Hancock v. Payne, 1 Ky. Opin. 257.

§ 1178. Ordering new trial, and directing further proceedings in lower court.

In actions ex contractu, when the evidence clearly preponderates against the verdict, a new trial should be granted.

Russell v. Lynn, 8 Ky. Opin. 192.

Where a cause is reversed by the Court of Appeals, and remanded for proceedings in accordance to this court's directions, the trial court must so proceed, and where on a retrial he does not so proceed the cause will again be reversed.

Watson v. Brown, 13 Ky. Opin. 584.

§ 1180. Effect of reversal.

The judgment of the Court of Appeals reversing a judgment perpetuating an injunction and remanding the case for only an assessment, etc., had the legal effect to dissolve the injunction.

Cleaver v. Beauchamp, 2 Ky. Opin. 93.

(E) RENDITION, FORM, AND ENTRY OF JUDGMENT.

§ 1182. Form and requisites.

Where land is not particularly described in a judgment ordering its sale, it will be ground for reversal, when presented on appeal, but will not be considered as a ground for reversal when the appeal is from an order confirming a report of sale.

Powell v. Sebre, 10 Ky. Opin. 209.

(F) MANDATE AND PROCEEDINGS IN LOWER COURT.

§ 1186. Mandate, remittitur, or order of remand.

A judgment rendered by the Court of Appeals affirming the judgment of the circuit court and awarding damages upon the amount of the judgment superseded, is in effect a mandate directing the court below to award

damages upon the amount of the judgment.

White v. Ferguson, 6 Ky. Opin. 199.

§ 1191.—Transmission and filing in lower court.

It is the imperative duty of the trial court to enter of record a mandate of the Court of Appeals.

Rouse v. Cate, 7 Ky. Opin. 530.

§ 1193. Effect in lower court of decision of appellate court.

After answer and proof, on a petition filed by the plaintiff to try a cause of action reversed on a former appeal, if the special causes set forth be not sustained, the court can not go behind the former adjudication to retry the questions then presented and involved in the record.

Beazley v. Mershon, 3 Ky. Opin. 21.

§ 1195.—As law of the case.

An opinion of the Court of Appeals is the law of the case in all subsequent proceedings therein and all subsequent appeals to the Court of Appeals involving the same controversy.

Davis v. Powell, 6 Ky. Opin. 567.

§ 1196. Powers and duties of lower court.

On the return of the case from the Court of Appeals, the court below has the same power to permit amended pleadings to be filed, that it had before the reversal of the judgment.

Crider v. Smith, 5 Ky. Opin. 24.

Where on appeal the Court of Appeals issues a mandate, the lower court must follow it.

Austin v. Commonwealth, 9 Ky. Opin. 605.

§ 1198.—Compliance with mandate or directions.

Where the chancellor seems not to have fully understood the order of the Court of Appeals, his disclaimer by way of response of any intention to disregard the mandate of this court is sufficient.

Avery & Sons v. Meikle & Co., 12 Ky. Opin. 398.

§ 1202.—Granting new trial or rehearing.

Where on appeal of a cause it is reversed and the court below is directed to enter judgment for appellant, such court should obey such mandate, leaving the other party to his remedy provided by the code, since he could then have filed his petition for a new trial based upon any defense that had arisen since the former trial; but where the trial court does not enter judgment, but permits the appellee to amend his pleadings presenting facts which would have authorized a new trial, such action will not be reversed because the appellant is not thereby deprived of any substantial right.

Joseph v. Hotopp, 13 Ky. Opin. 631.

§ 1203. Proceedings after remand.

Where the Court of Appeals affirmed a judgment of the circuit court awarding damages, the lower court has no power to investigate the question whether the judgment is erroneous.

White v. Ferguson, 6 Ky. Opin. 199.

After the mandate of the appellate court shall have been entered and final judgment rendered by the trial judge in the court below, the judgment may be stayed by supplementary pleadings, if the grounds for relief show in the allegations matters not litigated; but the court can not allow such proceedings to be begun before the mandate shall be entered, or accept such pleadings in lieu thereof.

Watson v. Avery, 2 Ky. Opin. 240.

On remand of a case after reversal by the Court of Appeals and the trial court has entered judgment according to the mandate before permitting supplemental proceedings to be filed, if appellant desires to pay the money in conformity with the judgment rendered in order to be relieved from litigation growing out of conflicting claims to it and presents a supplemental pleading to that effect, the trial court may order a curator to execute a bond and may appoint him to receive and hold the money pending the litigation subject to future order of the court.

Berry's Admr. v. Berry's Curator, 4 Ky. Opin. 606.

Ordinarily actions do not stand for trial at the term of court at which a mandate of the Court of Appeals, reversing a former judgment in the same case is filed, and a decree rendered thereon in the court below can not be entered until process is served on the litigants.

Musgrave v. Powell, 4 Ky. Opin. 23.

Where a case is remanded for a new trial, the appellant has a right to make a better case if he can and have judgment in the event he should show himself entitled to it, otherwise a new trial would be a mere farce.

Shercliff v. Cooper & Jarboe, 5 Ky. Opin. 772.

§ 1207. Rendition and entry of judgment or order as directed.

On the appeal of an action to enforce vendor's lien, the Court of Appeals will direct the character of judgment to be rendered in the court below; but upon a rule, for want of further preparation, the cause can not be adjudicated upon its merits.

Lewis v. Hawkins, 3 Ky. Opin. 452.

It is not discretionary with a judge of the lower court to enter the mandate of the Court of Appeals, and when such a mandate, accompanied with a motion for judgment, is presented, it must be entered and final judgment given.

Watson v. Avery, 2 Ky. Opin. 240.

Where on an appeal of a cause the Court of Appeals decides that if the plaintiff in the action had any valid claim it is one he has derived from an assignee and distinctly said such plaintiff had no right to set up such claim by amended petition, and that because no process had been served on defendant he was not required to take any notice of it, it is error for the trial court on the return of the case to pronounce judgment, "That in obedience to the opinion and mandate and because the allegations of the plaintiff are admitted he recover of the defendant the land mentioned in the deed from the assignee in bankruptcy."

Gillispie v. Bradford, 13 Ky. Opin. 125.

§ 1208. Making or compelling restitution.

Where there is an appeal from a judgment decreeing plaintiff's lien as prior to that of the defendant, and during the pendency of the appeal the receiver of the property pays money to such plaintiff in accordance to the judgment, and the judgment is reversed on appeal and the lien of the defendant held prior, the defendant may file his cross-bill for restitution of the money so paid under an erroneous judgment, and for revivor, when the plaintiff has died and an administrator has been appointed; and a demurrer will not lie to the bill because it does not show how much was collected by the decedent or his representative.

Gray's Exrs. v. Patton's Admr., 11 Ky. Opin. 327.

§ 1209. New trial.

This court can not interpose and award a new trial after the same was refused by the court below on the grounds that the verdict was contrary to the evidence.

Baker v. Marcum, 1 Ky. Opin. 211.

Where a new trial is awarded by the Court of Appeals in an ordinary action, the parties are not bound by the evidence on the former trial, but can introduce it over again with such alterations and additions as they see proper; hence amended pleadings should be liberally indulged in.

Cropper, Patton & Co. v. Sherman, Hall & Pope, 2 Ky. Opin. 296.

XVIII. LIABILITIES ON BONDS AND UNDERTAKINGS.

§ 1223. Nature of obligation.

The law does not require nor contemplate that an administrator, as appellant, shall sign an appeal bond, and where he signs as an individual he is individually liable.

Stamper v. Ingram, Admr., 5 Ky. Opin. 718.

§ 1225. Insufficient, informal, or defective bond or undertaking.

Where an appeal bond is styled, "Appeal from a judgment of T. R. Barnett, Judge, Green quarterly

court," but it is recited in the body of the bond that it is taken from the judgment of the Green county court, a mere omission by the draftsman, it is held that a recovery may be had on such bond, notwithstanding such defect.

Cantrill v. Poor, 8 Ky. Opin. 389

Where the issues in a case are purely legal and involve questions of fact, the Court of Appeals will not disturb the judgment of the trial court, unless palpably against the evidence.

Miller v. Payne, 13 Ky. Opin. 656.

§ 1234. Extent of liability.

Where a supersedeas bond for a principal debtor was executed, thereby causing delay in the collection of the debt, and pending the action, the debtor disposed of his property, the original sureties in the supersedeas bond were liable to the original sureties for the total amount of the debt paid by them.

Lear v. Ray, 4 Ky. Opin. 380.

In a suit on a supersedeas bond there can be no recovery on account of appellee being kept out of possession of land involved in the suit, when in the suit there was no judgment entitling appellee to possession, but only an order for the sale of the land.

Sayre v. Squires, 8 Ky. Opin. 544.

§ 1238. Actions.

§ 1239.—Right of action and form of remedy.

In a suit on an appeal bond it is not necessary to have a return of no property found against the principal, before being entitled to maintain an action on the bond against the sureties.

Pitman v. Watkin's Admr., 9 Ky. Opin. 902.

§ 1245.—Pleading.

Where supersedeas bond was conditioned that the obligors would pay all costs and damages that might be adjudged against them in the action and pay all rents or damages which might accrue on property of which appellants were kept out of possession by reason of the appeal, a petition to recover on the bond is defective which fails to aver that the costs and damages awarded had not been paid.

Sayre v. Squires, 8 Ky. Opin. 544.

APPEAL BOND.

Administrator not required to give, see Appeal, § 1223.

APPEARANCE.

§ 2. Right of defendant to appear.

§ 3. Authority to enter appearance for another.

§ 7. Proceedings constituting appearance.

§ 9.—General or special appearance.

§ 16. Jurisdiction acquired.

§ 19.—Of the person.

§ 25. Waiver of objection.

See Attachment, § 210.

By infants, see Infants, § 90.

Bond for, see Bastards, § 47.

Bond for—When void, see Criminal Law, § 102.

Conviction without appearance, see Municipal Corporations, § 634.

Excuse for non-appearance, see Bail, § 88.

In appellate court—Defects and errors cured, see Appeal, § 154.

Notice or process waived by, see Process, § 125.

Of defendant in bastardy, see Bastards, § 47.

§ 2. Right of defendant to appear.

A party litigant may appear by himself or by counsel, and he may be required by the court to elect to either take charge of his defense or permit it to be done by his counsel.

Abert v. Berry, 8 Ky. Opin. 343.

§ 3. Authority to enter appearance for another.

An answer signed by one of the devisees of a trust fund, reciting that all three devisees were respondents, is not an appearance for all.

McGill v. Nelson, 2 Ky. Opin. 344.

It will not be judicially presumed that an attorney had no authority to enter an appearance for defendant; but if he should do so without such authority the judgment would be void; and this can only be shown by a direct proceeding for that purpose.

Rutherford v. Richart & Gudgell, 2 Ky. Opin. 161.

§ 7. Proceedings constituting appearance.

Where, at the time complainant filed her petition, defendants were in court and waived notice, it had the effect of bringing defendants before the court for all the purposes of the petition.

Culbertson v. Brashear, 7 Ky. Opin. 541.

The filing of an answer by defendant constitutes an appearance in the action.

Bergan v. Garnett, 6 Ky. Opin. 11.

An absent defendant enters his appearance to the suit by an appeal from a judgment rendered against him.

Owens v. Bartley, 4 Ky. Opin. 265.

The filing of exceptions to a master commissioner's report, by an administrator, who had not been served with process to the suit, is held to be a sufficient appearance.

Robinson v. Steele, 2 Ky. Opin. 306.

§ 9.—General or special appearance.

Where an appearance order is in general terms, and there is nothing to show that the appearance was not intended to be general, it can not be presumed that appearance was made to one branch of the action in which they had but little interest, and that they ignored that branch of the action in which they were directly and vitally interested.

Kinney v. Hagnow, 6 Ky. Opin. 434.

§ 16. Jurisdiction acquired.**§ 19.—Of the person.**

Where a brother appears for his sister, who is a nonresident party to a suit to establish a claim against real estate, in which such sister has an undivided interest, and the brother has no authority to appear, the court has no jurisdiction or power to enter a personal judgment against her.

Skillman v. Atchison, 11 Ky. Opin. 105.

§ 25. Waiver of objections.

The appearance of defendant in the Court of Appeals cures a defect of the failure to execute a bond in the court below by appellant in a suit on a note.

Jones v. Matheney & Son, 2 Ky. Opin. 261.

By an appeal from a judgment rendered on constructive service of process, appearance is entered, and the party is bound to present his defense when the judgment is reversed, or move for time to do so.

Beazley v. Maret, 1 Ky. Opin. 128.

APPOINTMENT.

Of court commissioners, see Court Commissioners, § 1½.

APPORTIONMENT.

Of costs, see Costs, §§ 59, 103.

Of taxes, see Taxation, V., A.

APPRAISAL.

Of property sold at judicial sale, see Judicial Sales, § 6.

Of property levied on, see Execution, § 141.

Wrongful provision for in judgment, see Judicial Sales, § 6.

APPRENTICES.**§ 7. Proceedings for apprenticing.**

It is an essential part of every judgment, ordering the apprenticing of a child, to ascertain and fix its age.

Overby v. Overby, 2 Ky. Opin. 304.

APPROVAL.

Presumption of approval of contract made with county court, see Counties, § 222.

APPURTENANCES.

See Deeds, § 117.

ARBITRATION AND AWARD.**I. SUBMISSION.**

§ 1. Nature of proceeding.

§ 2. Constitutional and statutory provisions.

§ 5. Agreements to arbitrate.

§ 6.—Requisites and validity.

§ 12. Requisites and validity of submission.

§ 13. Making submission rule or order of court.

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§ 27. Competency.

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§ 75. Impeachment or vacation.

§ 77.—Motion to set aside or vacate.

§ 79. Collateral attack.

§ 82. Conclusiveness of adjudication.

§ 85. Actions on awards.

I. SUBMISSION.

§ 1. Nature of proceeding.

A common-law arbitration is as binding on the parties as if it had been made in pursuance of the statute.

Elms v. Hunt, 6 Ky. Opin. 361.

§ 2. Constitutional and statutory provisions.

Section 3, ch. 21, R. S. does not apply to arbitrators who do not derive their authority directly from the statute, but from agreement of the parties or rule of the court.

Perry v. Scott, 6 Ky. Opin. 729.

§ 5. Agreements to arbitrate.

Where a will is made and probated, giving an estate to two persons, and an administrator with the will annexed is appointed and enters suit for possession of the assets from a former agent of the testator, and the agent also brought a suit in equity for a settlement of his accounts as agent, it was held to be entirely proper, after such causes had been consolidated, for such parties to enter into an agreement to arbitrate the matters in controversy, and when an award is made

based on such an agreement it may be pleaded in said cause as a defense.

Phillips v. Phillips' Admr., 11 Ky. Opin. 78.

§ 6.—Requisites and validity.

Where, in a pending action without any order from the court, the parties agree to submit certain questions of fact to two lawyers for settlement, it amounts to a common-law arbitration, and when pleaded in the cause is effective, though the state arbitration statutes are not followed, and such report will obviate the necessity of submitting such questions of fact to a jury.

Woolfork v. Calloway, 9 Ky. Opin. 161.

§ 12. Requisites and validity of submission.

Where the parties to a suit submitted the controversy to arbitrators without answer by defendant, an answer could avail defendant nothing, where his exceptions to the award are overruled, unless he attempted to impeach the award on some equitable ground.

Ford v. Rice, 6 Ky. Opin. 409.

§ 13. Making submission rule or order of court.

Although an attorney is not empowered by his general authority, as such, to bind his client in a submission of his cause to arbitration, yet if he does so under special authority, or where in doing so his action is ratified and adopted by his clients, the award, if otherwise valid, may be enforced.

Jenkins v. Weeks, 2 Ky. Opin. 118.

II. ARBITRATORS AND PROCEEDINGS.

§ 27. Competency.

Where an arbitrator discloses the fact that he has personal knowledge of part of the transaction, but is not released from acting, the plaintiff can not subsequently complain, and an exception to the award on that ground was properly overruled.

Miller v. Eaves, 3 Ky. Opin. 312.

§ 28. Oath.

Informality in the oath administered

to arbitrators is not sufficient to set aside award.

Ellis v. Richardson, 1 Ky. Opin. 349.

§ 35. Concurrence of arbitrators in proceedings and decision.

Where a cause is submitted to arbitrators and no umpire is selected, the arbitrators are substituted for a jury, and the same unanimity is necessary in making an award as is required of a jury in rendering a verdict.

Knowles v. Lears, 6 Ky. Opin. 562.

Under ch. 3, R. S., relating to submission of controversies to arbitration, all the arbitrators and the umpire, if there be one, should act together, and if there is no umpire, an award shall be the joint decision of the arbitrators, unless the parties agree to be bound by the action of the majority.

Perry v. Scott, 6 Ky. Opin. 729.

§ 36. Umpire or third arbitrator.

The right to act as umpire can only be conferred by a rule of court from which an arbitrator derives his authority.

Perry v. Scott, 6 Ky. Opin. 729.

§ 40. —Decision of controversy.

Where, by the terms of a written agreement of parties to refer to arbitrators the matters in dispute between them, it was only in case of disagreement between the arbitrators that the umpire selected by them was to act, where there was a disagreement, the parties are entitled to the decision of the umpire alone, and the arbitrators have no further right to participate.

Harris v. Honaker, 8 Ky. Opin. 287.

III. AWARD.

§ 49. Making and formal requisites.

The signature of an umpire in an award by the two arbitrators, will not invalidate the award, the presumption being that it was the award of all.

Ballard v. Crutcher, 1 Ky. Opin. 184.

§ 54.—Publication and delivery.

Under Civ. Code, § 499, sub-sec. 6, requiring delivery of copies of award

to each of the parties, delivery of a copy of the award to the attorney of one of the parties is reversible error.

Underhill v. Raswell, 6 Ky. Opin. 392.

§ 56. Sufficiency..

§ 60.—Certainty.

Where an award is made by those selected as arbitrators in a pending cause, which states that they found stocks, notes, etc., in the agent's hands of the value of about \$140,500, including about \$16,000 in bad debts, and show item by item how they arrived at the aggregate sum, such an award is not subject to the objection that it is indefinite; and where no bad faith or fraud is shown such award will be final and binding on both parties.

Phillips v. Phillips' Admr., 11 Ky. Opin. 78.

§ 63. Mistake or error.

A board of arbitration after it has made an award, but before it adjourns, has the power to correct a mistake.

Hatcher v. Alford, 8 Ky. Opin. 719.

An award made by arbitrators will not be set aside for mere errors of judgment, when neither fraud nor mistake is alleged and shown.

Jones v. Hatchett, 9 Ky. Opin. 164.

The court has the power upon proper pleadings being filed to correct a mistake in an award made by arbitrators when it is shown such mistake has been made.

Jenkins' Exr. v. Brown, 10 Ky. Opin. 311.

§ 69. Amended and supplemental awards.

After an award is made and signed by the arbitrators, it can not be altered or amended without notice to the party affected by the amendment.

Jenkins' Exr. v. Brown, 10 Ky. Opin. 311.

After arbitrators have signed their award and adjourned their power ceases, and they have no right to alter the award without the consent of both parties; and any effort by such arbitrators to make a new award between the parties is a nullity.

Martin v. White, 10 Ky. Opin. 797.

§ 74. Waiver or repudiation by parties.

While a common law arbitration

will be enforced, if the parties to it disregard it and continue to claim their original boundary lines, and one of the original parties has sold his land, some of the parties have forgotten all about the arbitration, and more than fourteen years have elapsed since said attempt at arbitration, the award being by parol and the writing constituting the submission being lost, such award should not be followed; but the parties should be allowed to hold according to their paper titles.

Harber v. Scudder, 13 Ky. Opin. 985.

§ 75. Impeachment or vacation.

The fact that the views of the attorneys for one of the parties to an arbitration may have affected the action of the arbitrators is not ground for distributing the award, when the other party could have also had an attorney.

Elms v. Hunt, 6 Ky. Opin. 361.

An award made by arbitrators, not named by the court, but to be chosen by the parties litigant, is valid and binding, where the record shows who were chosen arbitrators, that they were all sworn, that the award was made and signed by one of them and the umpire, and that copies were furnished to each party; and where the parties with their witnesses and counsel appeared before the board on the day set for the hearing and all fully heard.

Eaton v. Sanders, 2 Ky. Opin. 247.

The courts have the right to set aside an award upon equitable principles; and fraud or palpable mistake as to the law or facts is the only ground for revising an award.

Payne v. Payne, 10 Ky. Opin. 327.

§ 77.—Motion to set aside or vacate.

An award made in a controversy over mutual accounts will not be set aside on the discovery of new evidence after the award is made, which evidence might have been discovered before the award was made by the exercise of proper diligence.

Cook's Exr. v. McRoberts' Admr., 12 Ky. Opin. 516.

§ 79. Collateral attack.

A party who has submitted the question of a boundary line to arbitration

and lost can not resort to a court of equity for relief.

Elms v. Hunt, 6 Ky. Opin. 361.

§ 82. Conclusiveness of adjudication.

No action can be maintained on the original cause of dispute after submission and award made thereon, without the award being successfully assailed.

Jenkins' Exr. v. Brown, 10 Ky. Opin. 311.

The common law respecting arbitrations and awards is still in force, and hence an arbitration and award is binding although the questions were not submitted by order of court or by any formal agreement.

Jones v. Hatchett, 9 Ky. Opin. 164.

A contract for the construction of a railroad by which a chief engineer is to act as an arbiter between the contractor and the company will be enforced and his final award will be acquiesced in.

Cincinnati Southern Ry. Co. v. Cummings, 13 Ky. Opin. 126.

An arbitration as to boundary line agreed to by the parties and by a former grantor of one of them, who would be liable on his warranty, is binding on all in the absence of fraud or mistake; since equity favors the settlement of such disputes, and the mere disappointment of a party at the action of his attorney or testimony of witnesses offers no reason for disregarding such settlement.

Perry v. Wilcoxon, 13 Ky. Opin. 779.

§ 85. Actions on awards.

Under § 6, sub-sec. 3, ch. 3, R. S., relating to awards by arbitrators, judgment can not be rendered on an award, unless the provisions of the statute have been complied with.

Ford v. Rice, 6 Ky. Opin. 409.

An appeal from an award of arbitrators operates as notice thereof, and the service of a copy on appellant is thereby dispensed with, even though such an award was not made out and returned and copies delivered ten days before the term of court at which judgment is rendered.

Ballard v. Crutcher, 1 Ky. Opin. 184.

In a suit between two claimants for land, where the vendor, under whom plaintiffs claim, accepted a deed to and asserted title to the land, recognizing the boundary as fixed by arbitrators, such an award is held to be competent evidence to establish title.

Gridley v. Craig, 2 Ky. Opin. 578.

A petition on an amount found by arbitrators is sufficient if it sets out the covenant between the parties to show the demand, and the award to show the amount.

Lee v. Harper & Co., 3 Ky. Opin. 526.

A petition on an award should set out so much of the terms of submission, with sufficient certainty, as to show that the award made is within the terms of submission, and when it fails to so state, it will be held insufficient.

Boswell v. Miller, 9 Ky. Opin. 281.

The terms of a submission to arbitration should be stated in the plaintiff's petition, to enable the court trying the action on the award to see whether the arbitrators have decided matters not submitted to them.

Boswell v. Miller, 9 Ky. Opin. 281.

ARGUMENT OF COUNSEL.

See Assault and Battery, § 43; Criminal Law, XII, E; Trial V.

Failure to object or except to, see Criminal Law, § 728.

Limiting time of, see Criminal Law, § 711.

Order of, see Criminal Law, § 1186.

Reference to other indictments pending against accused, see Criminal Law, § 709.

Right to open and close, see Trial, § 25.

ARMY AND NAVY.

Consideration of notes for securing discharge from army, see Bills and Notes, § 92.

§ 6. Officers.

§ 13.—Payment and allowances.

The government having paid the arrears to the widow, it must be presumed that she brought herself with-

in the provisions of the law, although the fact that the payment has been made to her may not be conclusive as to her right to retain the money as against her husband's creditors, it at least makes out a prima facie case in her favor.

Cooper v. Cooper's Heirs & Creditors, 5 Ky. Opin. 212.

ARRAIGNMENT.

Failure to arraign and cause defendant to plead, see Criminal Law, § 266.

ARREST.

I. IN CIVIL ACTIONS.

§ 3. Statutory provisions.

§ 7. Persons liable.

II. ON CRIMINAL CHARGES.

§ 61. Authority to arrest without warrant.

§ 62.—In general.

By military officers and confinement in military prison, see War, § 31.

I. IN CIVIL ACTIONS.

§ 3. Statutory provisions.

Art. 18, ch. 28, Revised Statutes, relating to arrest and trial of persons guilty of riot, rout, fraud, etc., is merely cumulative of the common-law remedy, and does not abrogate the common law on the subject.

Waddell v. Commonwealth, 7 Ky. Opin. 713.

§ 7. Persons liable.

An order of arrest obtained by a creditor can not be sustained when it is shown that the debtor has ample property to satisfy all his debts, and the creditors have levied attachments thereon; and the fact that there has been a return of no property on a general execution will not entitle a creditor to have the debtor arrested when the creditors have levied attachments on property sufficient to pay all their claims.

Cofer v. Woodyard, 12 Ky. Opin. 608.

II. ON CRIMINAL CHARGES.

§ 61. Authority to arrest without warrant.

An inferior army officer, even under the order of the general in command, does not have the right to arrest one upon mere rumor that accused had in his possession money belonging to the public enemies of the country to be used for their secret aid.

Smith v. Weatherford, 7 Ky. Opin. 460.

§ 62.—In general.

A peace officer may make an arrest without a warrant only when a public offense is committed in his presence, or where he has reasonable grounds for believing that the person he seeks to arrest has committed a felony.

Palmer v. Commonwealth, 13 Ky. Opin. 169.

ARREST OF JUDGMENT.

See Criminal Law, § 970.

Grounds for, see Criminal Law, § 967.

ARSON.

§ 26. Evidence.

§ 28.—Admissibility in general.

§ 31.—Motive.

§ 26. Evidence.

§ 28.—Admissibility in general.

Where in a trial of one charged with arson the court excludes from the consideration of the jury all the testimony as to an effort of the accused to burn a building on a prior date to the one charged, and the defendant is convicted, he can raise no question as to the correctness of the court's ruling.

Chenoweth v. Commonwealth, 13 Ky. Opin. 1127.

§ 31.—Motive.

It is legitimate for the state, on a trial of one charged with arson, to prove, as a motive for the accused burning a barn, that the prosecuting witness who owned the barn had, on the day before it was burned, aided the constable in trying to arrest the accused on another charge.

Taylor v. Commonwealth, 12 Ky. Opin. 233.

ASSAULT AND BATTERY.

I. CIVIL LIABILITY.

(A) ACT CONSTITUTING ASSAULT OR BATTERY AND LIABILITY THEREFOR.

§ 1. Nature and element of assault and battery.

§ 5.—Overt act in general.

§ 8. Defenses.

(B) ACTIONS.

§ 19. Grounds and conditions precedent.

§ 25. Evidence.

§ 27.—Admissibility in general.

§ 36. Damages.

§ 37.—Measure in general.

§ 39.—Exemplary.

§ 41. Trial.

§ 43.—Instructions.

II. CRIMINAL RESPONSIBILITY.

(A) OFFENSES.

§ 56. Assault with dangerous or deadly weapon.

(B) PROSECUTION AND PUNISHMENT.

§ 73. Indictment or information.

§ 74.—Requisites and sufficiency.

§ 81. Evidence.

§ 84.—Intent and malice.

§ 93. Trial.

§ 96.—Instructions.

I. CIVIL LIABILITY.

(A) ACT CONSTITUTING ASSAULT OR BATTERY AND LIABILITY THEREFOR.

§ 1. Nature and elements of assault and battery.

§ 5.—Overt act in general.

An assault is an unlawful offer of corporal injury to another by force, or force unlawfully directed toward the person of another under such circumstances as create a well founded fear of immediate peril; and where the accused with a seeming reckless disregard for the safety of human life, and a criminal wantonness, in an angry manner flourished a cocked pistol about, pointing it at times at a person, he is guilty of assault.

Justice v. Phillips, 13 Ky. Opin. 836.

§ 8. Defenses.

In an action for assault the following question was submitted in justification: "Was there any agreement

between your mother and plaintiff, when she consented to send you to school to plaintiff, as to whether he was to whip you or not?" and it was held not competent, as it is not stated that the alleged promise was made at the time the contract was made to send the daughter to school, or that it constituted any part of the contract.

Graves v. Weller, 4 Ky. Opin. 535.

To excuse the defendant on the ground of self-defense, the matter constituting same should be stated in the answer, that the plaintiff may have notice of the defense relied on.

Graham v. Daniel, 3 Ky. Opin. 262.

(B) ACTIONS.

§ 19. Grounds and conditions precedent.

An action for damages on account of an assault and battery does not survive, but dies with the party injured.

Lamadrids v. Cox, 9 Ky. Opin. 92.

§ 25. Evidence.

§ 27.—Admissibility in general.

Evidence conducing to show immediate provocation or attempted violence on the part of a plaintiff, in an action for damages for assault and battery, is competent as part of the res gestae, and in mitigation of damages, but not as a dismissal of the suit.

Graham v. Daniel, 3 Ky. Opin. 262.

§ 36. Damages.

§ 37.—Measure in general.

In a suit for damages on account of assault and battery, where the defendant raised no issue by his answer except the amount of damages, it was not error for the court to refuse an instruction except as to the measure of damages.

Finnell v. VanArsdall, 8 Ky. Opin. 416.

§ 39.—Exemplary.

Where an attack is premeditated and is an aggravated case of an assault and battery, even when no serious bodily harm results, punitive damages are recoverable.

Watts v. Lingenfelton, 10 Ky. Opin. 535.

§ 41. Trial.

§ 43.—Instructions.

In an action for assault and battery, an instruction, that "If the jury believe from the evidence that, at the time the blow was struck by defendant, she believed and had reasonable ground to believe that it was necessary to protect herself from bodily harm, she had a right to use such force as was necessary to protect herself," was held erroneous.

Graham v. Daniel, 3 Ky. Opin. 262.

An instruction, "that if the assault made by appellant, arose from the heat of blood caused by the whipping of his child in violation of the agreement made between the parties when said child was sent to school," etc., and qualified by "provided the jury believe that there was not time enough between the hours at which defendant was informed of the whipping of his child, and the time the assault was committed to enable defendant's blood to cool," and by omitting the words, "in violation of the agreement made," etc., was properly refused, as the fact that the whipping was done in violation of the agreement is to be assumed by the court, and taken from the consideration of the jury.

Graves v. Weller, 4 Ky. Opin. 535.

Where an answer to an action for assault admitted the same but justified it upon the ground that it was done in defense of his son, who had been assaulted by plaintiff; as the defendant had the burden of proof, he was entitled to the concluding argument to the jury.

Allen & Allen v. Spidwell, 4 Ky. Opin. 466.

II. CRIMINAL RESPONSIBILITY.

(A) OFFENSES.

§ 56. Assault with dangerous or deadly weapon.

Where one, in attempting to shoot the husband, manifested an utter disregard of the safety of the wife, and pointed the pistol at her in shooting distance, it amounted to an assault.

Rodgers v. Flick, 7 Ky. Opin. 22.

(B) PROSECUTION AND PUNISHMENT.**§ 73. Indictment or information.****§ 74.—Requisites and sufficiency.**

An indictment for assault is defective where it fails to allege that the person assaulted was in striking distance of the person making the assault.

Berry v. Commonwealth, 4 Ky. Opin. 639.

In charging assault and battery with intent to kill, an indictment is not defective for failing to state that the person assaulted did not die.

Taylor v. Commonwealth, 8 Ky. Opin. 401.

An indictment for assault and battery with intent to kill is good even though it does not contain an averment that it was done without previous malice.

Bradley v. Commonwealth, 8 Ky. Opin. 599.

An indictment is good which charges that the accused wilfully and maliciously shot and wounded a named person, and it will be implied that the accused shot at him, and in the absence of a bill of exceptions exhibiting the evidence, it will be presumed the evidence sustained the charge.

Stone v. Commonwealth, 11 Ky. Opin. 135.

§ 81. Evidence.

When the evidence against a defendant in a suit for damages for an assault and battery is circumstantial, and he has it in his power to produce a witness who might explain the facts, the inference arising from his failure to do so may be properly deduced by the jury.

Watts v. Lingenfelton, 10 Ky. Opin. 535.

§ 84.—Intent and malice.

Malice, like any other fact, must be proven in the trial of a case where malicious wounding is charged, but this may be done by circumstantial evidence from which the jury may infer malice.

Walker v. Commonwealth, 13 Ky. Opin. 508.

§ 93. Trial.**§ 96.—Instructions.**

An instruction in a trial of one charged with malicious cutting and stabbing is misleading, which states in substance that the defendant should be found guilty where the cutting was not necessary and when he had no reasonable grounds to believe the same to be necessary, since such an instruction falls far short of a proper one as to self-defense.

Baker v. Commonwealth, 13 Ky. Opin. 146.

ASSAULT WITH INTENT TO KILL.

See Homicide, IV.

Instructions as to, see Homicide, § 292.

ASSESSMENTS.

Failure to pay, see Insurance, § 249.

For public improvements, see Municipal Corporations, IX., E.

Of taxes, see Taxation, V.

Under insurance policy, see Insurance, § 195.

Unpaid stock subscriptions, see Corporations, § 89.

ASSESSORS.

Authority to hear complaints of taxpayers, see Taxation, § 465.

ASSETS.

Application of partnership assets, see Partnership, §§ 177, 180, 182.

Lost by negligence of administrator, see Executors and Administrators, § 118.

Of corporation constitute trust fund, see Corporations, § 544.

Real property not assets, see Executors and Administrators, § 39.

ASSIGNEE.

Action against, see Assignments, § 125.

Defenses against assignee of note, see Bills and Notes, § 314.

In bankruptcy, see Bankruptcy, § 246.

Rights of assignee of note, see Bills and Notes, § 313.

ASSIGNMENT OF ERRORS.

See Appeal, XI.

Necessity of alleging error as ground for new trial, see Appeal, §732.

ASSIGNMENTS.**I. REQUISITES AND VALIDITY.****(A) PROPERTY, ESTATES, AND RIGHTS ASSIGNABLE.**

§ 17. Executory contracts.

§ 18.—In general.

§ 20. Written instruments.

§ 21. Rights of action.

§ 22.—In general.

§ 24.—For tort.

(B) MODE AND SUFFICIENCY OF ASSIGNMENT.

§ 40. Assignments in writing.

§ 53. Consideration.

§ 57. Notice to debtor.

(C) VALIDITY.

§ 62. Capacity and assent of parties in general.

§ 64. Fraud, duress, or undue influence.

II. OPERATION AND EFFECT.

§ 73. Property or interest transferred.

§ 75. Rights passing as incidents.

§ 88. Assignments as security.

III. RIGHTS AND LIABILITIES OF PARTIES.

§ 90. Nature and extent of rights of assignee in general.

§ 94. Rights of assignee as against debtor.

§ 95. Rights of assignee as against assignor.

§ 98. Rights of assignee as against third persons.

§ 112. Liabilities of assignor to third persons.

IV. ACTIONS.

§ 124. Against assignor.

§ 125. Against assignee.

§ 126. Defenses.

§ 127. Jurisdiction and venue.

§ 129. Parties.

§ 130. Pleading.

§ 131.—In general.

§ 133. Evidence.

§ 136.—Assignment.

"Assignment" and "transfer" synonymous, see Bills and Notes, § 310.

Defenses in action by assignee of note, see Bills and Notes, §§ 450, 452.

Judgment against assignee, see Judgment, § 16.

Not payment, see Payment, § 18.

Of bill or note, see Bills and Notes, V., C.

Of bond for conveyance of land, see Vendor and Purchaser, § 214.

Of certificate of sale, see Judicial Sales, § 57.

Of contingent right of dower, see Dower, § 49.

Of distributive share of estate, see Descent and Distribution, § 86.

Of dower, see Dower, §§ 66, 68.

Of franchises to build and operate road, see Franchises, § 8.

Of inchoate dower right, see Dower, § 57.

Of insurance policies, see Insurance, VII.

Of judgments, see Judgment, XVIII.

Of lease, see Landlord and Tenant, IV., B.

Of mortgage notes, see Mortgages, § 241.

Rights of assignee of title bond, see Vendor and Purchaser, § 214.

Right of assignee of usurious contract, see Usury, § 89.

Set-off against assignee of bill, see Set-off and Counterclaim, § 22.

I. REQUISITES AND VALIDITY.**(A) PROPERTY, ESTATES, AND RIGHTS ASSIGNABLE.**

§ 17. Executory contracts.

§ 18.—In general.

A contract to pay board, like contracts for personal services, is not transferable without the consent of the promisor.

Sparks v. Hemphill, 8 Ky. Opin. 543.

§ 20. Written instruments.

The assignment of a title bond does not carry with it a warranty of title.

Harris v. Lawson, 6 Ky. Opin. 438.

An assignment of a note carries with it a mechanic's lien securing the debt, and the assignee must use due diligence to collect the debt with the means at hand.

Sower v. Cumming, 6 Ky. Opin. 216.

§ 21. Rights of action.

§ 22.—In general.

Where the right of a plaintiff is assigned during the pendency of the ac-

tion, it may be continued in his name, or the court may allow the name of the assignee to be substituted in the action.

Bendles & Bolinger v. Pierce, 9 Ky. Opin. 762.

§ 24.—For tort.

The right to recover damages for loss of goods by a common carrier may be assigned and the assignee may sue for same by making the assignor a party defendant.

Potts v. Bowler, 1 Ky. Opin. 133.

(B) MODE AND SUFFICIENCY OF ASSIGNMENT.

§ 40. Assignments in writing.

The law does not require a deed of assignment to be written in any particularly phraseology or according to any technical form.

Levy v. Bamberger & Co., 1 Ky. Opin. 533.

§ 53. Consideration.

The maker of a note has a right to give and the holder to accept, additional security for a note given for a pre-existing debt, for which the maker was bound, and his desire to further secure the debt is a sufficient consideration to uphold the executed contract of assignment.

Henderson Nat. Bank v. Lagow, 10 Ky. Opin. 103.

Where a contractor had a contract to perform certain work for a railroad company, which provided that 20 per cent. of the estimates should be withheld by the company to insure the completion of the work, and the contractor after becoming indebted for labor and materials, assigned the contract to one of his creditors with the understanding that the 20 per cent. coming to him from the portion of the work completed should go to pay laborers; and after the contract was fully completed by the assignee, and the assignee was about to collect the 20 per cent. earned by the assignor, the railroad company, the assignee and the assignor were sued by the laborers to subject said 20 per cent. to their claims, and where all of said parties were before the court, it was held that the reservation of said 20 per cent. was a part of the considera-

tion for the assignment, and that said sum could be collected by such laborers on proof of their allegations. *Graham v. Sheets*, 12 Ky. Opin. 735.

§ 57. Notice to debtor.

An obligee who has notice, oral or written, of the assignment of a claim, can not escape liability to the assignee, by payment of the amount of the claim to the assignor, or by purchasing debts against the assignor as set-offs against the claim.

Van Winkle v. Kayer, 7 Ky. Opin. 585.

(C) VALIDITY.

§ 62. Capacity and assent of parties in general.

The surrender of land to the sheriff to be sold to satisfy an execution which had been returned "No property found," where the creditor has only an equitable interest in the land, will not operate as an assignment under the statute.

Jennings v. Jennings, 1 Ky. Opin. 611.

When property is owned by a person at the time of the filing of a petition in bankruptcy, his assignment thereafter to another will convey nothing.

Harris' Assignee v. England, 10 Ky. Opin. 686.

§ 64. Fraud, duress, or undue influence.

In the absence of allegations or proof, of the existence of the debts sued on, or improper motive, fraudulent design, or failure of consideration, an assignment of stock, though the title did not pass, will not be disturbed, the assignee having a prior lien thereon.

Wilder & Co. v. Allgood, 3 Ky. Opin. 575.

II. OPERATION AND EFFECT.

§ 73. Property or interest transferred.

A sale of land in contemplation of insolvency, and the assignment of the purchase-money notes to one creditor with the intent to prefer him to the exclusion of other creditors, operates as an assignment of all the debtor's property and effects for the benefit of all his creditors, in proportion for

their respective demands including those that are future and contingent.

Smith v. Hardin, 1 Ky. Opin. 546.

A parol assignment of a note will operate as an equitable transfer of indemnity against loss on the indorsement of a bill of exchange.

Ford v. Crockett & Hildreth, 1 Ky. Opin. 382.

§ 75. Rights passing as incidents.

The assignee of a note is invested with the equitable right to avail himself of the benefits of any lien the assignor may have held to secure the payment thereof and a written transfer passes no greater interest in a mortgage or deed of trust by reason of its being mentioned in the writing, than it would have passed, if it had been omitted.

Thornhill & Richardson v. Ford, 5 Ky. Opin. 262.

§ 88. Assignments as security.

Where a bona fide assignment of personal property is made to a bank to secure a debt owing to the bank from the assignor, the bank has the right to the proceeds of a sale of the property sold by a commission merchant as against the assignor or his creditors.

Morgan, Thomas & Co. v. Bank of Rome, 8 Ky. Opin. 812.

III. RIGHTS AND LIABILITIES OF PARTIES.

§ 90. Nature and extent of rights of assignee in general.

A party seeking to recover as the assignee of another must do so, if at all, on the cause of action set up by his assignor, and not on a separate cause of action he may have independent of the rights he secured by the assignment.

Kanawha & Ohio Coal Co. v. Hunt, 8 Ky. Opin. 178.

§ 94. Rights of assignee as against debtor.

A person can not be required to accept as a boarder any one who might become the purchaser of a contract entered into by the boarding-house keeper with the assignor of the contract.

Sparks v. Hemphill, 8 Ky. Opin. 543.

§ 95. Rights of assignee as against assignor.

If the immediate assignor is a non-resident, or if nothing can be recovered from him in the prosecution of a suit with due diligence, the holder of the assigned note may, by a proceeding in equity, be substituted to the rights of his assignor against a remote assignor.

Cline v. Edwards, 7 Ky. Opin. 522.

An assignee has no right of action at law against a remote assignor.

Cline v. Edwards, 7 Ky. Opin. 522.

A petition must allege facts showing diligence in the prosecution of the claim against the maker, as a prerequisite to a suit against the assignor.

Gand v. Green, 4 Ky. Opin. 287.

Where a petition contained no averment of any agreement, or undertaking in writing or parol, by the defendant that he would warrant the solvency of M.'s estate, the alleged "verbal assignment" importing no more than a mere sale and delivery of the note, without assigning it, a verbal assignment of a note devolves no responsibility on the seller, for the solvency of the obligor in the debt.

Gand v. Green, 4 Ky. Opin. 287.

Where a party is liable as assignor, his responsibility is to his immediate assignee, and can only be enforced through him.

Gilmore v. Hoskins, 4 Ky. Opin. 296.

§ 98. Rights of assignee as against third persons.

One can not take a vested right as an assignee of a void contract.

Morrison & Oakes v. Voorhies & Co.; Jones & Co. v. Monday, 6 Ky. Opin. 627.

§ 112. Liabilities of assignor to third persons.

Where the assignee of a note obtained judgment against the obligors therein soon after it became due in June, 1877, but shows only that he caused execution thereon to issue on the — day of —, 1877, which was returned nulla bona, he fails to exhibit facts showing when execution was issued, and that he proceeded dili-

gently, and hence the assignor is discharged.

Schofield v. Weinstock, 10 Ky. Opin. 132.

The unreasonable delay of the holder of a note in prosecuting his action to collect it, after instituting a suit, will release the assignor; but where it is made to appear that the continuances of the cause were at the request of the assignor he is not released because of such delay.

Trustees of Nat. Bank of Franklin v. Ford & Bros., 10 Ky. Opin. 189.

Where a creditor has instituted his action and recovered a judgment as soon as a judgment could have been obtained, and the administrator of the debtor having been removed before an execution could issue, it became the duty of the assignor to take steps to save himself from liability, and it was not incumbent upon the plaintiff to administer or cause some one else to do so; and where, after a public administrator was appointed, plaintiff was enjoined from proceeding to collect, he used necessary diligence, and the assignor is liable.

Willmot's Exr. v. Hayden, 10 Ky. Opin. 534.

IV. ACTIONS.

§ 124. Against assignor.

In order to charge an assignor of a note, suit must not only be brought, but it must appear that due diligence has been used in suing out an execution on the judgment, and an averment made of the time when and to the county to which it issued, and it is not sufficient to say that "an execution was duly issued on said judgment."

Young v. Edwards, 5 Ky. Opin. 333.

§ 125. Against assignee.

An action cannot be maintained against the assignee of a note, where he is free from fraud or deceit, until the estate of the maker is prosecuted to insolvency, and no proof short of that furnished by a judicial determination or a return of nulla bona will suffice.

Thornhill & Richardson v. Ford, 5 Ky. Opin. 262.

§ 126. Defenses.

The statute has not made the inadequacy of the consideration, or the absence of any consideration, for the assignment of a valid defense to an action by an assignee, however the circumstances may affect the rights of the maker of the note and of the assignee, when the former sets up a defense or set-off arising after notice.

Henderson Nat. Bank. v. Lagow, 10 Ky. Opin. 103.

§ 127. Jurisdiction and venue.

Where the circuit and quarterly courts of the same county have concurrent jurisdiction, the assignee of a note must sue in the one holding its regular term first after the assignment.

Rogers, Admx., v. McHenry, 5 Ky. Opin. 255.

§ 129. Parties.

Where a written contract is not assignable, an assignment will pass an equitable right only, and where suit is brought on such contract for its breach, the assignor must be made a party.

McGuire v. McGuire, 8 Ky. Opin. 253.

§ 130. Pleading.

§ 131.—In general.

A petition is bad which merely alleges that in "due time" suit was instituted by the assignee on the note assigned and a judgment was recovered, and that in due time an execution issued and was returned "no property found," since what is due time is a question of law, and the plaintiff must allege facts to enable the court to determine what diligence was exercised by the assignee in his effort to collect the note.

Puthuff v. Howe, 11 Ky. Opin. 599.

§ 133. Evidence.

The assignee of a note must show affirmatively that he has used due diligence in coercing collection from the obligors to entitle him to recover against his assignor.

Schofield v. Weinstock, 10 Ky. Opin. 132.

§ 136.—Assignment.

Where a contract is not a lease, but amounts to a license, and is therefore

not assignable, there is no error in the court's refusal to allow proof of the assignments of such contract.

Thomas v. McGuire, 10 Ky. Opin. 633.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

I. REQUISITES AND VALIDITY.

(A) NATURE AND ESSENTIALS OF TRUST FOR CREDITORS.

§ 2. Conveyances and transactions creating trust.

§ 10. Constructive assignments.

§ 11.—In general.

§ 12.—Conveyances or payments to favored creditors.

§ 14.—Mortgages or other transfers as security.

§ 16.—Judgments, attachments, and executions.

§ 29. Property to be included.

§ 44. Notice to and acceptance by creditors.

§ 83. Omission of property.

(D) PREFERENCES.

§ 104. Right of debtor to prefer creditor.

§ 107. Intent of debtor.

§ 118. Preferences in assignment in general.

§ 128. Preferences by firms or partners.

(E) FRAUD.

§ 147. Transactions before assignment.

§ 151. Fraud in provisions of assignments in general.

II. CONSTRUCTION AND OPERATION IN GENERAL.

§ 195. Debts included.

IV. ADMINISTRATION OF ASSIGNED ESTATE.

§ 238. Sale or other disposition of assets.

§ 267. Actions.

§ 274.—Jurisdiction and venue.

V. RIGHTS AND REMEDIES OF CREDITORS.

(A) IN AID OF ASSIGNMENT.

§ 295. Actions by creditors.

(B) PRESENTATION, PROOF, AND PAYMENT OF CLAIMS.

§ 300. Time for presentation.

§ 303. Presentation and filing.

§ 310. Rights of creditors to priority.

(C) CLAIMS AND LIENS PRIOR OR SUPERIOR TO ASSIGNMENT.

§ 334. Liens and charges in general.

I. REQUISITES AND VALIDITY.

(A) NATURE AND ESSENTIALS OF TRUST FOR CREDITORS.

§ 2. Conveyances and transactions creating trust.

Before a lien has been acquired by a creditor, a debtor may rightfully convey his property to all of his creditors, or to a trustee for their benefit and the nonacceptance of the trust by the trustee will not defeat the rights of the beneficiaries under the deed of assignment as the chancellor will appoint a trustee.

Smith & Waide v. Culbertson & Co., 5 Ky. Opin. 160.

§ 10. Constructive assignments.

§ 11.—In general.

Where a petition in equity alleges, not only actual fraud, but also that conveyance was made in contemplation of insolvency, and both actual and constructive fraud is established, the constructive fraud brings the transaction within the Act of 1868, and is an assignment for the benefit of the debtor's creditors.

Henry v. Smith, 6 Ky. Opin. 278.

Where an insolvent person suffers judgment to be rendered against him by his confession, in contemplation of insolvency and with the purpose to prefer some creditors to the exclusion of others, such act operates as an assignment of all his property for the benefit of all of his creditors.

Dils v. Adkins, 11 Ky. Opin. 298.

§ 12.—Conveyances or payments to favored creditors.

Where, upon appeal to the Court of Appeals, it was decided that certain conveyances were made to defraud creditors, and in contemplation of insolvency, and hence were to be treated as assignments for the benefit of creditors, but did not determine whether the claim of an innocent purchaser who had paid for land had a preference over other claims, such a purchaser is entitled to be heard before

the assets of such insolvent person are distributed to creditors.

Kinney v. Hayman, 12 Ky. Opin. 112.

§ 14.—Mortgages or other transfers as security.

An insolvent debtor can not defeat other creditors by mortgaging his property to one creditor, and such a mortgage made in contemplation of insolvency will have the effect to assign all his property for the benefit of all of his creditors, but where the mortgagee has a valid claim he is entitled to participate in the distribution of the estate.

Trimble v. McGuire, 12 Ky. Opin. 136.

Where an insolvent debtor, against whom large judgments are about to be taken, mortgages all of his property to one creditor, it is such a preference as comes under the statute, and will amount to an assignment of all of his property for the benefit of all of his creditors; and this is true whether the insolvency and purpose to prefer is known by the mortgagee or not.

Nock's Exr. v. Goodloe, 12 Ky. Opin. 278.

§ 16.—Judgments, attachments, and executions.

One who, in contemplation of insolvency, confesses judgments in favor of some of his creditors, where no process is served upon him, thereby commits such an act as will result in assigning all his property for the benefit of all his creditors.

Ellis v. Johnson, 12 Ky. Opin. 163.

§ 29. Property to be included.

Where R. conveyed his property for the benefit of his creditors, property acquired by R. while unlawfully assuming to act as agent for the United States Treasury in seizing the property of belligerents during the civil war, belongs to the creditors of R. rather than to P., who was a partner of R. in such illegal business, of which, under a compromise agreement between them, P. was entitled to a certain part of the property so wrongfully taken.

Robinson's Trustee v. Pinnell, 7 Ky. Opin. 374.

§ 44. Notice to and acceptance by creditors.

Under Stat., 1856, relating to equitable assignment for the benefit of creditors, before an assignment can affect the rights of creditors in the distribution of the insolvent's estate, the sale or transfer must be such as in law gives the creditor notice of its existence.

Henry v. Smith, 6 Ky. Opin. 278.

§ 83. Omission of property.

If the deed contains recitals and fails to make an exhibit of the whole estate, the burden is on defendant to show the facts.

Mitchell & Barbee v. Shannon, 7 Ky. Opin. 207.

(D) PREFERENCES.

§ 104. Right of debtor to prefer creditor.

The mere fact that a creditor believes and the debtor knows that he is in a perplexed financial condition is not sufficient to convert an innocent effort to secure such creditor into an assignment of all his property for the payment of his creditors generally, and a mortgage to secure such creditor is valid, especially when the debtor, at the time, has property sufficient, if judiciously managed and not sacrificed by his creditors, to pay all his debts.

Crabtree v. Burns, 11 Ky. Opin. 112.

§ 107. Intent of debtor.

The evidence was held not to show that a debtor in selling his property for the payment of his debts was actuated by the intent of giving preference or advantage to some of his creditors over others in contemplation of insolvency.

Bank of Kentucky v. Emmerson, 6 Ky. Opin. 665.

§ 118. Preferences in assignment in general.

Two essential facts must exist before a sale by a debtor will operate as an assignment for the benefit of creditors under the Statute of 1856. First, the insolvency of the vendor;

second, the sale must have been made to prefer a creditor.

Harlan v. Harlan, 1 Ky. Opin. 392.

Where a debtor in contemplation of insolvency attempts to secure one or more creditors to the exclusion of others, however free from fraud the case may be, as to such preferred creditors, yet the statute makes the transfer inure to the benefit of all the other creditors, not only as to the property or effects so transferred, but all the property and effects of the debtor.

Mitchell v. Shrader, 1 Ky. Opin. 329.

§ 128. Preferences by firms or partners.

Where a transaction based on intrinsic evidence that it was an attempt on the part of the debtor to prefer one creditor to the exclusion of others, and the device of pledging the individual estate of one of the partners instead of that of the firm, which was the real debtor, can not avail the preferred creditor in her attempt to escape the consequences of the law preventing fraudulent assignments.

Kinney v. Hagnow, 6 Ky. Opin. 434.

(E) FRAUD.

§ 147. Transactions before assignment.

Where a debtor, just prior to making an assignment for the benefit of creditors, drew from a bank a large sum of money which was not turned over to the assignee, and was never accounted for, it will be presumed that the debtor is still enjoying the money.

Phillips v. Wathen, 6 Ky. Opin. 174.

§ 151. Fraud in provisions of assignment in general.

If a creditor is a party to the constructive fraud by purchasing or obtaining the transfer of the debtor's property for the purpose of securing antecedent debts, and after the commission of an act bringing the cause within the Act of 1856, makes additional payments on the purchase or transfer, or the debtor becomes otherwise indebted to the purchaser, such cause should be rejected, as in such

case notice is brought directly home to the creditor.

Henry v. Smith, 6 Ky. Opin. 278.

II. CONSTRUCTION AND OPERATION IN GENERAL.

§ 195. Debts included.

All debts contracted by a debtor between the execution of a bond to convey his land and the date of the deed should, when properly proven, be allowed to participate in the estate of the insolvent debtor.

Henry v. Smith, 6 Ky. Opin. 278.

IV. ADMINISTRATION OF ASSIGNED ESTATE.

§ 238. Sale or other disposition of assets.

Where the circuit court has assumed jurisdiction and is administering upon an assignee's estate, and a petition is filed in such court seeking a sale of land included in the assignment for the benefit of creditors, and while the petition is pending the assignor filed his petition in bankruptcy, was adjudged a bankrupt and the land assigned to him as a homestead, it is held that, the circuit court having with full and complete jurisdiction undertaken to sell the estate, the proceeding in the bankrupt court did not oust the circuit court of its jurisdiction, and a purchaser under its judgment of sale will hold the land, where no exceptions are made to the report of sale and no claim to a homestead is asserted in such court.

Scott v. Grinstead, 11 Ky. Opin. 857.

§ 267. Actions.

§ 274.—Jurisdiction and venue.

An adjudication in bankruptcy will not deprive the state court of its jurisdiction already acquired to inquire whether the bankrupt had committed an act within the statute of 1856, which would amount to an assignment of all of his property for the benefit of all of his creditors, since the only effect the adjudication could have in such a case would be to protect the bankrupt against a personal judgment.

Rollins v. Hawkins, 10 Ky. Opin. 318.

V. RIGHTS AND REMEDIES OF CREDITORS.

(A) IN AID OF ASSIGNMENT.

§ 295. Actions by creditors.

The creditors of one who has made a sale, assignment or mortgage in violation of the Act of 1856 have the right to have such a transfer adjudged as a transfer of all the debtor's property for the equal benefit of all of his creditors, provided one or more of them brings an action for that purpose within six months after the instrument is recorded or the property delivered.

Brewer v. Hill, 10 Ky. Opin. 30.

(B) PRESENTATION, PROOF, AND PAYMENT OF CLAIMS.

§ 300. Time for presentation.

Where one assigns all chattels, choses in action, etc., for the benefit of his creditors, and the trustee appointed fails to act and the assignor is permitted to control, consume or squander the assets, the creditors are held to be guilty of laches.

Young & Co. v. Board's Heirs, 2 Ky. Opin. 541.

§ 303. Presentation and filing.

A creditor who does not file his claim with the assignee, holding property for the benefit of creditors, but who relies upon the homestead alone for the payment of his debt, can not participate in a distribution to creditors by such assignee, since he might have filed his claim and thus received his pro rata share and still have attacked the homestead for the balance of his claim, where the claim existed prior to the passage of the homestead act.

Simmons v. Phelps, 12 Ky. Opin. 337.

§ 310. Rights of creditors to priority.

Where a conveyance is made in contemplation of insolvency and to prefer a creditor, and the conveyance is held to be an assignment for the benefit of all the creditors, a petition for preference is good, filed by a purchaser at such sale, showing that he had purchased the real estate for many thousands of dollars, in good faith without any notice or knowledge

of insolvency, or that an act of insolvency had been committed, and paid the full purchase-price before the assignment was made or suit instituted; and if the proof sustains such plea he is entitled to a preference as a creditor, not having been permitted to hold the land.

Kinney v. Hayman, 12 Ky. Opin. 112.

(C) CLAIMS AND LIENS PRIOR OR SUPERIOR TO ASSIGNMENT.

§ 334. Liens and charges in general.

Although actual fraud may be proven, under the allegation in a petition that the conveyance was in contemplation of insolvency, the equitable rights of creditors attached when the conveyance was made, and a superior lien could not thereafter be acquired by any creditor in a proceeding at law or equity.

Henry v. Smith, 6 Ky. Opin. 278.

ASSOCIATIONS.

§ 19. Rights and liabilities of association as to persons not members.

Where the treasurer of a lodge borrows money for the lodge and his act is approved by resolution of the grand lodge, which authorizes him to borrow money for the lodge thereafter at his discretion, the lodge is liable for the money so loaned which was intended for and was used for its benefit.

Assignee of Savings Bank of Louisville v. The Grand Lodge of Kentucky, 12 Ky. Opin. 307.

ASSUMPSIT, ACTION OF.

§ 17. Pleading.

§ 19.—Declaration.

It is a rule of pleading in assumpsit that a promise must be alleged, or in lieu of it facts from which the law will imply a promise, and that a pleading is bad which can only be supported by inconclusive deductions from the facts averred.

Turner's Exr. v. Peacock, 9 Ky. Opin. 396.

The absence of a promise to pay renders a petition, in a quantum meruit count in assumpsit, bad.

Riley v. Masonic Joint Stock Co. of Owenton, 9 Ky. Opin. 573.

Where goods are sold and delivered at the request of the purchaser for which he agreed to pay a reasonable sum and the goods are alleged to be worth so many dollars, and these facts are alleged in an action in assumpsit, the pleading is sufficient to maintain a recovery if the proof authorized it.

Williamson v. Morton & Co., 11 Ky. Opin. 590.

ASSUMPTION OF RISK.

See Master and Servant, III, F. Injuries from fellow servants, see Master and Servant, § 216. Instruction as to, see Master and Servant, § 295.

ATTACHMENT.

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(A) NATURE OF REMEDY, CAUSES OF ACTION, AND PARTIES.

- § 1. Nature and purpose of remedy.
- § 15. Existence of or resort to other remedy.
- § 16. Persons entitled.
- § 17. Persons liable.

(B) GROUNDS OF ATTACHMENT.

- § 21. Necessity of grounds extrinsic to cause of action.
- § 22. Nature of cause of action.
- § 23. Insolvency or inability to satisfy demand.
- § 25. Non-residence.
- § 26. Absconding, absence, or concealment.
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- § 31. Acts in official or fiduciary capacity.
- § 32. Fraud in contracting or incurring liability.
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- § 179. Priorities between attachments.
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By landlord against tenant, see Landlord and Tenant, § 229.

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Of witnesses, see Witnesses, § 17.

Presumption as to time of filing petition, see Appeal, § 907.

Priority between pledge lien and attachment lien, see Pledges, § 23.

Reversal of judgment in attachment, see Appeal, § 1170.

I. NATURE AND GROUNDS.

(A) NATURE OF REMEDY, CAUSES OF ACTION, AND PARTIES.

§ 1. Nature and purpose of remedy.

An attachment authorized by a legislative enactment is not invalid, which seeks to subject a citizen's property, by reason of his violation of its provisions, and is not in conflict with the constitutional provision, declaring "absolute, arbitrary power over the lives and property of freeman exists nowhere in a republic, not even in the largest majority."

Beazley v. Mershon, 3 Ky. Opin. 21.

§ 15. Existence of or resort to other remedy.

A plaintiff in a court of equity, seeking to attach property or effects of his creditors, must show that he has exhausted his ordinary legal remedy for collecting his debt.

Adkins v. Meadows, 9 Ky. Opin. 124.

Before a judgment creditor can successfully attach and subject the property of his judgment debtor to the satisfaction of his claim, he must have execution on his judgment and a return of no property found for such part of the judgment as the creditor seeks to have satisfied by his attachment.

Logsdon v. Woodard, 9 Ky. Opin. 375.

§ 16. Persons entitled.

Parties to an attachment suit, where personal property is sold thereunder, are estopped from setting up an adverse title inconsistent with said adjudication which is binding upon them until reversed.

Dyen v. Brownfield, 2 Ky. Opin. 372.

§ 17. Persons liable.

Where a petitioner only has an equitable title to land, the legal title being in another, he should have joined the legal holder by a proper pleading with a view to obtain the legal title.

Owsley v. Cook & Co., 1 Ky. Opin. 518.

In the collection of a judgment against a railroad corporation, it is error for the court to award an order of attachment against the president and directors of the company, without first bringing them into court as garnishees and ascertaining whether they had money or property of the defendant in their possession or under their control.

Louisville & N. R. Co. v. Hall, 8 Ky. Opin. 690.

(B) GROUNDS OF ATTACHMENT.

§ 21. Necessity of grounds extrinsic to cause of action.

It is not enough that plaintiff should believe, in an attachment suit, that he would lose his rent if the attachment should not issue, but he must go further and show that there existed reasonable grounds for that belief.

Gentry v. Abshire, 11 Ky. Opin. 81.

§ 22. Nature of cause of action.

Where grounds of attachment are denied by defendant, the burden is on plaintiff to sustain them.

Queen & Hayden v. Rosenfield Bros., 7 Ky. Opin. 161.

Neither the refusal of a tenant to sign a lease nor his denial that he was bound for the rent will furnish any ground for an attachment of his property.

Helm v. Neal, 11 Ky. Opin. 33.

§ 23. Insolvency or inability to satisfy demand.

It is a good ground for the issuing of an attachment against property of a defendant not exempt from execution, where plaintiff alleges "that from the delay arising from obtaining judgment and return of no property found the collection of his debt will be endangered, and the defendant has not property enough in this state, subject to execution, to satisfy the plaintiff's demand."

Garvin v. Smith, 10 Ky. Opin. 528.

§ 25. Non-residence.

An allegation in a petition for rent that the defendants are non-residents authorizes attachment for the amount due.

Hall's Safe & Lock Co. v. Meade, 6 Ky. Opin. 219.

§ 26. Absconding, absence, or concealment.

Attachment creditors of a decedent are not entitled to judgment against administrator until they shall manifest in proper form their claims against decedent's estate, notwithstanding that their claims are against an absconding administrator proceeded against by attachment, since the heirs and distributees are the substantial parties to be affected.

Beazley v. Mershon, 3 Ky. Opin. 21.

§ 28.—Departure and absence.

The allegation that the defendant had departed from this state with the intent to defraud his creditors, is a ground for an attachment, and the allegation that the defendant had voluntarily left the county of his residence and had gone into a Confederate State and had remained there for more than thirty days is also grounds for an attachment.

Pigg v. Yates, 1 Ky. Opin. 299.

That the defendant had departed from this state with the intent to defraud his creditors and had so con-

cealed himself that a summons could not be executed on him, are sufficient grounds for an attachment.

Johnson v. Cable & Sons, 1 Ky. Opin. 576.

Where O. having agreed to mortgage certain property to H., his creditor, as collateral security, shortly thereafter by bill of sale, transferred all his property to K., but possession was not actually delivered; which was done in seeming contemplation of the removal from the state of O., before the expiration of his lease from H.; it was sufficient to sustain an attachment by a creditor.

Oanfelt v. Hodge, 2 Ky. Opin. 239.

The concealment which would authorize an attachment involves the intention of the debtor to delay or prevent his creditors from enforcing their demands by avoiding the service of summons.

Johnson v. Cable & Sons, 1 Ky. Opin. 576.

An attachment can not be sustained where the evidence clearly shows an amount of property subject to execution, out of which plaintiff's debt could have been paid, the insolvency of a defendant not being sufficient to authorize an attachment.

Godshaw v. Bramberger, Bloom & Co., 10 Ky. Opin. 556.

§ 31. Acts in official or fiduciary capacity.

Where the assignee of a bankrupt has in his hands a fund belonging to a creditor, and a creditor of such creditor attaches the fund in the assignee's hands, his action will fail where the assignee alleges and proves that he was surety of the attachment debtor and others on a note, and as such paid off the note and it was assigned to him, and there was a balance due on it exceeding the amount of the attached funds in his hands.

Miller v. Ferrell, 11 Ky. Opin. 48.

§ 32. Fraud in contracting or incurring liability.

Before this extraordinary remedy is resorted to, the party obtaining it should have proof upon which to base this action, and the court, in hearing and determining such a question,

ought to be well satisfied, from the testimony, of the existence of the fraud charged.

White v. Bondurant, 5 Ky. Opin. 351.

Where a sale of a grocery is made by its owner, who does not pay his creditors, and the fact is shown that such sale was made without any change of possession from the seller to the buyer, it is fraudulent and void as to the seller's creditors, and they may attach the property and subject it to the payment of their claims.

Kahn & Wolf v. Goodhart, 11 Ky. Opin. 462.

An attachment can only be maintained where there is fraud, and where fraud is not shown an attachment will fail.

Bloom & Co. v. Kingston, 13 Ky. Opin. 893.

§ 39. Fraudulent transfer or other transfer of property.

The evidence was held to establish a fraudulent combination between a defendant and third persons for the purpose of holding the property of defendant as against the claims of his creditors, and to be sufficient to sustain an order of attachment.

Moss v. Blain, 7 Ky. Opin. 563.

Where J. contracted in writing with W. to cut his lumber, payable on delivery, but subsequently made a parol agreement to give him twelve months' time, and a few months afterwards, J. sold his mill and the vendee continued to cut for W., an attachment against W. before the end of the credit period was premature.

Whalen v. Johnson, 3 Ky. Opin. 341.

The securing of a creditor, who is not a party to any scheme by a debtor to prefer creditors, where both parties show an honest intent, is not ground for an attachment.

Cummings v. Homans & Co., 4 Ky. Opin. 106.

The efforts on the part of a debtor to have suits brought against him, on paper on which the members of his wife's family are endorers, and his desire to make a secret sale of his land, although without the desire to

prefer a creditor, when connected with the other facts and circumstances proven, establishes the fraudulent intent in the sale and disposition of the property.

Wilson v. Stoner, 5 Ky. Opin. 746.

An action can not be maintained to collect rent not due, even if plaintiff is entitled to recover, without an allegation of fraud upon which attachment can be based.

Hall's Safe & Lock Co. v. Meade, 6 Ky. Opin. 219.

The absence of principal from the state is a ground for an attachment against the property of an endorser or surety not absent from the state or participating in any fraud.

Bank of Louisville v. Smothers, 9 Ky. Opin. 4.

§ 40.—In general.

An attachment by creditors against land charged to have been conveyed by a debtor to defraud his creditors, and that the grantee participated in and had knowledge of the fraud, is sustained by proof that the grantor, after suits were filed against him by creditors, stated that he was not going to pay such debts, but would convey his estate to others and that he did convey the greater portion of a good sized estate to relatives residing with him and who knew of his financial troubles and who do not furnish proof of or explain the transactions between them.

Allen v. Farmers' Bank of Kentucky, 11 Ky. Opin. 725.

II. PROPERTY SUBJECT TO ATTACHMENT.

§ 49. Personal property in general.

Money received by a jailor as assignee of the claims of jail guards is attachable and subject to payment of the debts of the owner even though he be the jailor.

Connelly v. Webster, 6 Ky. Opin. 329.

The salary of a town marshal is not subject to attachment on a return of no property found.

Sanders v. Hyfield, 4 Ky. Opin. 40.

A sale of lumber, and retention of possession by the vendor, is not a valid sale so as to defeat the attachment of a subsequent creditor.

Brown & Co. v. Hungerford, 4 Ky. Opin. 330.

A third party can not hold personal property against an attaching creditor, where the purchase price has not been paid, nor the possession delivered.

Morris v. Kimble, 5 Ky. Opin. 179.

A bounty, which was not received by a soldier in his lifetime, is not subject to seizure in the course of transmission to the person entitled thereto.

Fish v. Hays, 6 Ky. Opin. 108.

Where machines in transit were consigned to defendant in attachment and the machines in transit were attached, and the consignees were acting only as the agents of the owners of the machines, such property should not be subjected to the payment of the agents' and consignees' debts.

Cozine & Bro. v. Kennedy, 6 Ky. Opin. 706.

Where there has been a sale of partnership property by a receiver, the sale of the same property under an attachment against one of the partners is invalid.

Gaddis & Co. v. Ramsey, 8 Ky. Opin. 65.

§ 51. Property mortgaged or otherwise incumbered.

Creditors who attach personal property in the hands of a commission man for sale that has been assigned to a bank as security for a debt, acquire but an equity by the seizure of the property, and the bank having an older equity under the assignment has a better right.

Morgan, Thomas & Co. v. Bank of Rome, 8 Ky. Opin. 812.

§ 57. Interests under contracts.

Money due a teacher in the common schools from a state can not be attached in the hands of the school commissioners.

Hanks & Porter v. Stewart, 6 Ky. Opin. 578.

§ 58. Equitable estates or interests in general.

Under Act of March 15, 1870, relating to garnishment before judgment and return of "no property found," attachment can only be levied on money, choses in action, or equitable interests.

Vick v. Kelly, 7 Ky. Opin. 100.

A judgment should not be rendered against an administrator in an attachment proceeding, until the creditors shall manifest, in proper form, their claims against the decedent's estate, for the heirs and distributees are the substantial parties to be affected.

Beazley v. Mershon, 3 Ky. Opin. 21.

Property in the hands of an agent who has no notice of sale made prior to the levy of the attachment, is subject to the attachment, as possession did not follow the sale.

Burton v. Wingate, 5 Ky. Opin. 37.

§ 61. Rights of action in general.

A creditor, as vendor of the insured property to one to whom the policy had been assigned, has a right to attach the liability of the insurance company to the assignee.

Kentucky Ins. Co. v. Jones, 2 Ky. Opin. 545.

Conceding that an insolvent parent may provide reasonable education and maintenance for his minor children, according to their station in life, and that money advanced for such purpose could not be attached by his creditor, the amount set apart by a parent for the education and maintenance of his daughters was unreasonable and wholly incompatible with the rights of his creditors, under the circumstances with this case.

Tevis v. Ellison & Co., 1 Ky. Opin. 539.

§ 64. Property in custody of the law.

Money in the hands of a receiver belonging to an insolvent debtor is subject to attachment by his creditors.

Phillips v. Wathen, 6 Ky. Opin. 174.

III. PROCEEDINGS TO PROCURE.

(A) JURISDICTION AND VENUE.

§ 71. Jurisdiction of action.

While an attachment for rent must be sued out in the county in which the tenement lies, it may issue to any county in the state; still, in an action before a justice of the peace, although the attachment was issued in H. county and levied upon property in D. county, the property was thereby placed within the custody of the law and the jurisdiction of the court that issued the attachment, and jurisdiction in rem was thereby acquired.

Turpin v. Smith, 13 Ky. Opin. 756.

§ 73. Jurisdiction of property attached.

An attachment is but an incident to a cause, and where the court has jurisdiction of the parties, some of whom reside in one county and others in another, the court has jurisdiction to subject the land in the county where the court does not sit, and to remove a cloud upon the title in order to do so.

Bogard & Bro. v. Buckner, Terrell & Co., 12 Ky. Opin. 581.

(B) AFFIDAVITS.

§ 91. Formal requisites.

It is error to sustain an attachment levied on a nonresident's real estate in the absence of an affidavit to the effect that the defendant has no personal property in this state, or not enough to satisfy plaintiff's claim.

McQuarry v. Rochester, 2 Ky. Opin. 112.

An attachment, without the prescribed affidavit, will be discharged; and where the evidence shows by a preponderance of the proof that the grounds of the attachment are not sustained, it will be dismissed.

Houston's Exr. v. Nichols, 1 Ky. Opin. 466.

Before real estate can be ordered sold under an attachment, the plaintiff must file an affidavit to the effect that the defendant has no personal property or not enough thereof to satisfy the debt.

Pigg v. Yates, 1 Ky. Opin. 299.

§ 92. Averments in general.

To authorize the issuance of a writ of attachment, the affidavit upon which it is based must charge fraud, and aver that the affiant believes the charge to be true.

Fichtner v. Griffin & Son, 9 Ky. Opin. 462.

§ 102. Averments as to cause of action.

The code expressly requires that the affidavit for an attachment shall state that the claim is just, and the omission to state is fatal to the efficacy of the attachment.

Northern Bank of Kentucky v. Bell, 11 Ky. Opin. 346.

§ 104. Averments as to indebtedness.

An affidavit in attachment which charges indebtedness to an agent instead of the real plaintiff, is not in compliance with the code.

Stark & Co. v. Lewis & Nesbit, 7 Ky. Opin. 711.

An attachment creditor must aver in his petition or affidavit in direct terms or in substance that his claim is just, and that he verily believes he is entitled to recover the amount set forth.

Buckley v. Wakefield, 8 Ky. Opin. 283.

§ 116. Averments as to property of defendant.

After issue made and trial begun upon the merits of a case, it is too late for an objection to the petition or attachment for want of verification.

Lynch v. Shepherd, 2 Ky. Opin. 183.

When a plaintiff sets forth sufficient grounds of attachment in a verified petition, it is not necessary to the validity of the attachment that the same facts should be stated and verified in a separate affidavit.

Johnson v. Cable & Sons, 1 Ky. Opin. 576.

§ 123. Filing.

The failure of a clerk to indorse on the petition at the time of its filing, does not, ipso facto, destroy the validity of attachment.

Green v. Preston & Bro., 7 Ky. Opin. 629.

§ 125. Defects, objections and waiver.

Where property is attached by a landlord for rent, and on its return the tenant executes a bond to perform the judgment of the court and thereby secures the discharge of the attachment and lien on the property seized, he will not thereafter be heard to say that there was no affidavit on which to base the attachment.

Wall v. Gates, 10 Ky. Opin. 232.

(C) SECURITY.**§ 128. Necessity and purpose.**

The appearance to a suit in attachment removes the necessity of taking refunding bonds as required by the civil code, as against a defendant constructively summoned, as the creditors could proceed to obtain judgments in personam.

Beazley v. Mershon, 3 Ky. Opin. 21.

There must be a bond executed, as required by § 440, Civil Code, to the defendant for restoring the property to him should it turn out that the attachment was wrongfully sued out, before an attachment can be issued.

Pigg v. Yates, 1 Ky. Opin. 299.

§ 129. Parties by and to whom to be given.

A sheriff is required to take the attachment bond for the reason that he must know the solvency of the sureties and that they have executed the undertaking.

Kerty & Hasny v. Miles, 6 Ky. Opin. 609.

§ 132. Form and requisites of bond or undertaking.

An attachment bond, to be a valid statutory bond, must have been executed in the manner provided by statute, and where the statute requires the bond to be executed in the presence of the sheriff, it can not be taken by the clerk or other officer and thereby make it a statutory obligation.

Kerty & Hasny v. Miles, 6 Ky. Opin. 609.

Where an attachment for rent is issued under the statute, a proper bond in compliance therewith, provid-

ing for damages in double the amount, shall be given, and any bond not in conformity thereto will deprive the defendant of his action for such damages.

Freeman v. Keogh, 3 Ky. Opin. 220.

§ 133. Sufficiency and justification of sureties.

When a demand in an attachment suit is for \$780 and the bond is in the sum of \$1,400, the court, nothing else appearing, will presume it sufficient.

Sutton v. Perkins, 11 Ky. Opin. 76.

IV. WRIT OR WARRANT.

§ 141. Authority to issue.

The clerk can not revise the ruling of the court dismissing an attachment by issuing another attachment upon the same record which the court had decided did not authorize it.

Farris' Exr. v. Rowland, 8 Ky. Opin. 819.

§ 143. Time for issuance.

An attachment can only be issued at the time or after the commencement of an action, and an action is commenced by filing the petition in the clerk's office and causing a summons to be issued or a warning order made; and an attachment is void where no summons has issued, and this question can be raised by another creditor.

Hale & Head v. Grogan, 10 Ky. Opin. 296.

§ 155. Alias writs.

After the discharge of the first attachment and no new cause of attachment is shown, the issuance of a second attachment by the clerk is unauthorized and void.

Farris' Exr. v. Rowland, 8 Ky. Opin. 819.

V. LEVY, LIEN, AND CUSTODY AND DISPOSITION OF PROPERTY.

§ 168. Property levied on under other process.

A petition on a sheriff's bond which alleges conversion of attached property and that the sheriff has left

the state without accounting for the property, constitutes a sufficient petition in an action on the sheriff's bond.

Coker v. Commonwealth, 3 Ky. Opin. 515.

§ 175. Operation and effect of levy in general.

By a levy of attachment, the court acquires an equitable control over the property so far as is necessary to accomplish the objects of the attachment.

Bryant v. Bryant, 7 Ky. Opin. 7.

§ 177. Creation and existence of lien.

Where an attaching creditor places his attachment in the hands of the sheriff and has it levied, he acquired no legal right or title to the property; but it is a mere equity, and he can not sell more than his creditor's interest.

Mulligan v. Neeter, 5 Ky. Opin. 103.

The increased price at which land was sold, after the first sale had been set aside, is a part of the proceeds of the attached property, and the attaching creditors had acquired liens on it as valid and available to them as were their liens on the land.

Bradley v. Bradley, 3 Ky. Opin. 68.

Attaching creditors only acquire an equitable right by their attachment, which is subject to be defeated by any prior equity, if presented and litigated in proper time and manner.

Cayse & Bowers v. Morton & Walker, 3 Ky. Opin. 322.

Upon an exchange of lands, where it is shown that one of the parties had practiced fraud and had no title to his portion, the vendee would be entitled to have his conveyance canceled, and the attaching creditor would obtain no lien thereon.

Cayse & Bowers v. Morton & Walker, 3 Ky. Opin. 322.

If a lien is created by a writ of attachment, such lien is lost when returned by the sheriff without a levy.

Lewis v. Richards, 8 Ky. Opin. 209.

Where an attachment has been placed in the hands of the officer,

and is levied, the attachment lien is perfected, and it relates back to the time when the attachment came to the officer's hands.

Thompson v. Callings, 10 Ky. Opin. 842.

§ 178. Property or rights affected and extent of lien.

An attaching creditor of the distributee, by reason of his attachment before allotment, has a prior lien.

Jarboe's Admr. v. McLane, 1 Ky. Opin. 474.

An attaching creditor has no lien on a fund derived from the sale of a debtor's property, unless it is derived from a sale of property on which his attachment has been levied.

Houston's Exr. v. Nichols, 1 Ky. Opin. 466.

One must establish his claim and that his adversary is indebted to him before he can successfully fasten an attachment lien on real estate.

White v. Bolton, 9 Ky. Opin. 453.

§ 179. Priorities between attachments.

When an order of attachment is sued out and delivered to the sheriff a lien is thereby created on the property of the defendant, prior and superior to one subsequently issued, although the sheriff levies the last one first.

Rexinger v. Loeb & Bloom, 5 Ky. Opin. 301.

When the sheriff levies attachments first coming to his hands on a reasonable amount of property, the levy of subsequent attachments on other property will give those a prior lien over the first attachments.

Rutherford v. Richart & Gudgeon, 2 Ky. Opin. 161.

Where plaintiff begins attachment proceedings against a defendant under a wrong name and had to begin over again, his first action does not give him priority over those filing attachment proceedings after his first suit was begun.

Boulware v. Loudon, 8 Ky. Opin. 93.

§ 180. Priorities between attachments and other liens or claims.

Attachments which were levied be-

fore a mortgage on the property was executed take precedence over the mortgage, and a sale of the property under the mortgage will not remove the lien or place the mortgagee in any better condition.

Bryant v. Bryant, 7 Ky. Opin. 7.

Where a debtor assigns a chose in action prior to his attachment by a creditor, the equity of the assignee is superior to that of the attaching creditor, but where the attaching creditor obtains a judgment he obtains a legal right to the attached property which is superior to the prior equity of the assignee.

Osborne v. City of Louisville, 6 Ky. Opin. 411.

Without a personal judgment against an administrator, or against him in his fiducial capacity in an attachment suit, his individual means cannot be converted to the payment of debts of the attaching creditors of the intestate.

Beazley v. Mershon, 3 Ky. Opin. 21.

The liens of the attaching creditors were held prior in time and superior to any which the attorney for the debtor acquired on the increased price, by his services rendered.

Bradley v. Bradley, 3 Ky. Opin. 68.

An attachment issued and summons served before an assignee of chattels, by delivery, acceptance or otherwise had acquired a vested interest in the property, will take precedence.

Hyatt's Admr. v. Chestnut, 3 Ky. Opin. 174.

Where several creditors attach the property of their common debtor, and one of them summons a third party as garnishee, he has a prior lien on this debt, notwithstanding it was not mentioned in the judgment sustaining the attachments.

Ullman & Co. v. Cloyd, 5 Ky. Opin. 336.

Where appellants had their attachment levied on the tract of land to which L had the legal title, and L obtained a deed for the land in controversy from his father for the con-

sideration of six hundred dollars and the further consideration that he would support his father, on the land, during his natural life, and the father had the deed canceled upon the allegation that the consideration had failed, and appellants had obtained an attachment lien on the land previous to the filing of the petition for cancellation, the only lien which the father has upon the land is for his support during his life.

Prichard & Bolt v. Lewis, 5 Ky. Opin. 583.

Where, before the issuing of an attachment, the property sought to be attached had been levied upon by a proper officer pursuant to a judgment and execution, such levy created a lien superior to that sought to be created by the attachment, and the validity of such attachment may be brought in question by the execution creditor.

Fichtner v. Griffith & Son, 9 Ky. Opin. 462.

§ 184. Waiver, release, or abandonment, and discharge or extinguishment of levy or lien.

The attorney of an attachment plaintiff has power to direct a stay of the attachment proceedings.

Ward v. George, 6 Ky. Opin. 263.

The attaching creditors have no lien on the rents, which the debtor was deprived of by reason of the illegal sale of his land.

Bradley v. Bradley, 3 Ky. Opin. 68.

An order by the attorney of the attachment plaintiff, does not operate to release the levy.

Ward v. George, 6 Ky. Opin. 263.

§ 186. Custody and care of property. Property coming into a sheriff's hands on attachment, must be preserved, and an illegal conversion of same, and leaving of the state, is a breach of his bond.

Coker v. Commonwealth, 3 Ky. Opin. 515.

§ 191. Delivery of property on forthcoming or delivery bond.

Whether there was a surrender to

attachment defendant of the property attached, was held a question for the jury.

Ward v. George, 6 Ky. Opin. 263.

§ 192. Release of property on security.

Under § 268 of the Code, the court has power to permit the execution of a bond, upon the terms therein prescribed, upon the execution of which the property attached should be released.

Kerty & Hasny v. Miles, 6 Ky. Opin. 609.

§ 194. Sale or other disposition of property.

§ 195.—In general.

Where, after property is attached, the owner conveys it pending the attachment suit, and the ground of attachment is not sustained, the purchaser of the land from the owner pending the attachment proceeding is not affected by it.

Smith v. Snowden's Admr., 6 Ky. Opin. 234.

Where, under an attaching creditor's demand for rent, the produce of the farm and other personal estate on the premises, on which, under the warrant, he had an exclusive lien, were sufficient to satisfy the same, the court did not err in applying so much of the proceeds thereof as was necessary to discharge the attachment debt.

Houston's Exr. v. Nichols, 1 Ky. Opin. 466.

Although a judgment directing a sale under attachment did not reserve a lien for the purchase money, it was error to convey the land without reserving a lien, and the purchaser being a party to the record, his purchase may be ordered canceled; but where a purchaser is not a party his deed may be set aside by special proceeding, but this will not affect his purchase.

Rutherford v. Richart & Gudgell, 2 Ky. Opin. 161.

The court should ascertain the amount owing each creditor, to be paid out of funds received by each

defendant, and order a return into court of the surplus.

Beazley v. Mershon, 3 Ky. Opin. 21.

The debtor is entitled to remain in possession of land attached, until a valid judgment of sale is rendered, and a legal sale made thereof.

Bradley v. Bradley, 3 Ky. Opin. 68.

Although a proceeding is not literally to enforce a lien created by levy of attachment, the judgment of the court should fix a place for the sale of attached land, and require the commissioner to make the sale on the first day of some county or circuit court.

Stephenson v. Lishy & Co., 4 Ky. Opin. 538.

It is error to pay over to the plaintiff the proceeds of attached property without the execution of the bond required by section 440 of the Civil Code.

Rowseau v. Sheckler, 5 Ky. Opin. 282.

A judicial sale of real estate attached, sold by order of the judgment, is void where no specific description of the real estate is included in the judgment.

Hackworth v. Thompson, 8 Ky. Opin. 585.

§ 201. Title and rights of purchasers.

The chancellor should always ascertain where the legal title is to land, and have it matured so that a purchaser at his sale can be assured that he is purchasing the land and not a law suit, as this depresses the price and causes a sacrifice.

Owsley v. Cook & Co., 1 Ky. Opin. 518.

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

§ 205. Process in action and service on defendant.

However defective may be the warning orders in an attachment suit against a nonresident, his appeal to the appellate court is constructive service, and equivalent to an actual

service at the filing of the mandate in the lower court.

Beazley v. Mershon, 3 Ky. Opin. 21.

§ 210. Appearance.

Where G obtained a judgment at law against R and filed an answer to an attachment suit asserting a vendor's lien, but failed to make his answer a cross-petition against R, or in any manner to make him a party; the entry of R's appearance did not make him a party to G's answer.

Rutherford v. Richart & Gudgeon, 2 Ky. Opin. 161.

Appearance to a suit in attachment removes the necessity of taking refunding bonds as required by the civil code, as against defendant constructively summoned, but this will not preclude defendant, by proper proceedings, from defeating the attachment in whole or in part, for any legal cause existing previous to such appearance.

Beazley v. Mershon, 3 Ky. Opin. 21.

The filing of the affidavit controverting the grounds of attachment has the legal effect of entering the appearance of the defendant for all purposes.

Hayner & Dunlevy v. Templeman, 5 Ky. Opin. 542.

In an attachment suit against the husband, a wife may enter her appearance and make defense in the name of her husband for the benefit of herself and minor children.

Crawford v. Combs, 8 Ky. Opin. 200.

§ 211. Sufficiency of complaint or other pleading.

The grounds of attachment having been controverted by the answer, the burden of proving it devolved on the plaintiff.

Lawson v. Hopkins, 3 Ky. Opin. 657.

The plaintiff in an attachment suit must show that he had a subsisting cause of action when he commenced it, either by showing that his debt was due and unpaid or by showing that

the grounds of attachment, or some one of them, existed.

Mattingly v. Simms, 8 Ky. Opin. 886.

§ 213. Trial in general.

It is the duty of an attaching creditor to show that the property attached was that of his debtor.

Smith v. McWilliams, 3 Ky. Opin. 246.

§ 217. Judgment.

An order of court authorizing the plaintiff to withdraw the proceeds of the attached property from the hands of the officers, is in effect to sustain the attachment, and is a final judgment so far as the order of attachment is concerned.

Rowseau v. Sheckler, 5 Ky. Opin. 282.

In a suit by the purchaser of partnership property at receiver's sale, against the purchaser at an attachment sale against one of the partners, a judgment is proper giving the plaintiff the property, if it may be found, and if not for its value.

Gaddis & Co. v. Ramsey, 8 Ky. Opin. 65.

VII. QUASHING, VACATING, DISOLUTION, OR ABANDONMENT.

§ 226. Grounds for quashing, vacating, or dissolving.

§ 227.—In general.

The filing of a petition in bankruptcy was held not to dissolve an attachment obtained prior to the filing of such petition.

Grimes v. Kinkead, 7 Ky. Opin. 611.

Where the debt for which property is attached is not due, and the clerk granted the attachment, such property was properly discharged from it.

Garvey v. Garvey, 11 Ky. Opin. 910.

Where an attachment is issued and levied, and the grounds of attachment are controverted, in the absence of any proof to sustain it, the trial court must discharge the attachment.

Mitchell v. Ruckland, 13 Ky. Opin. 801.

§ 231.—Want of jurisdiction.

Where parties agree that the question is as to whether the attachment should be sustained shall be submitted to the court and parol evidence heard on the motion to dissolve, if it was irregular for the court to hear that branch of the case, the irregularity was waived by the agreement.

Leet v. Robertson, 8 Ky. Opin. 638.

§ 232.—Defects or irregularities in proceedings.

Though an attachment be authorized and is instituted under an act of the legislature, it does not prevent the debtor from showing the irregularities in the issue of the attachment, particularly those that would vitiate it.

Beazley v. Mershon, 3 Ky. Opin. 21.

§ 235.—Ownership of property attached.

An attachment will not be sustained where the attaching creditor had actual notice of the assignment before suing out the attachment, and the deed of assignment is sufficient, notwithstanding the instrument was neither acknowledged nor recorded.

Levy v. Bamberger & Co., 1 Ky.

Opin. 533.

When land has been sold and deed lodged for record before an attachment issues, and there is no pleading in the cause assailing the deed as fraudulent or voluntary, the attachment will be discharged.

Lowden v. Boulmore, 1 Ky. Opin. 444.

§ 253. Pleading in abatement, or traverse of grounds of attachment.

An answer by defendant in attachment more than five months after the filing of the petition of attachment, in which the defendant "denies that he is about to sell or transfer or dispose of his property with intent to cheat," etc., is not responsive to the petition because of the time which elapsed between the filing of the petition and the answer.

Thompson v. Hockworth, 7 Ky. Opin. 171.

§ 254.—Grounds in general.

A tenant who is an attachment defendant is entitled to make any defense that is available to him in any other kind of an action.

Mattingly v. Mattingly, 8 Ky. Opin. 777.

§ 260. Actions to set aside attachment.

After a judgment in rem has been reversed, in an attachment suit, on constructive service, and no judgment in personam rendered on appearance in the court below, it is error for the court to treat the judgment as against the defendant, and allow a judgment over for the excess received by the creditors.

Beazley v. Mershon, 3 Ky. Opin. 21.

§ 275. Reinstatement.

Where an attachment has been discharged by the circuit judge and reinstated by a judge of the Court of Appeals, it will be assumed that the discharge and reinstatement were made on the merits of the case, and such presumption is entitled to a controlling influence.

Shercliff v. Cooper & Jarboe, 5 Ky. Opin. 772.

The discharge of an attachment, pendente lite, is an interlocutory order, from which no appeal lies, and can only be reinstated by application to and before a judge of the appellate court.

Winchester & Co. v. Darnaby, 4 Ky. Opin. 326.

VIII. CLAIMS BY THIRD PERSONS.**§ 280. Intervention in general.**

After a cause has been fully adjusted, money attached, paid over and the parties dismissed out of court, no matter for what cause the delay, a claimant of the attached fund cannot be permitted to reopen the case for further adjudication.

Cleaver v. Ebersole & Glasscock, 3 Ky. Opin. 253.

§ 286. Claims or liens prior or superior to attachment.

An allegation in the answer of the creditor that he is advised and believes that no valid or effectual at-

tachment had been levied on the debt in controversy, is not sufficient to overthrow the lis pendens by a prior suit, being a seizure of all the assets, choses in action, moneys, etc.

Brownfield v. Howell's Exr., 4 Ky. Opin. 485.

Where a claimant by interpleading claims property attached in the name of M. D. Cord, as due by assignment of claim from S. P. Cord, it is held not idem sonans, and the dismissal of the petition is proper.

Cleaver v. Glasscock, 3 Ky. Opin. 253.

Where in an injunction proceeding against a corporation, an attachment of all choses in action, franchises, money on hand, is served on the president and the treasurer of the corporation, a prior lien is obtained over a fund owing by a third party not made a party to the suit, but whom the defendant admitted was indebted to them, which amount according to the answer of the debtor was paid in by a verbal order five days before the suit was filed, such an attachment is prior to a creditor, who subsequently attached the fund by serving the debtor with due process.

Brownfield v. Howell's Exr., 4 Ky. Opin. 485.

§ 290. Intervention to contest attachment.**§ 292. —Grounds for contest.**

Where goods are attached by creditors of a person, the wife of the debtor may defeat the attachment by showing that the property attached is hers.

Gibson v. Marples, 8 Ky. Opin. 497.

§ 294. Rights of claimants of property attached in general.

Where a third person claims the property attached and the question of ownership is referred to the master for proof and report, and the commissioner reported that some of the property attached belonged to a third party, which report was confirmed, it was error to adjudge that all the property attached be sold.

Hillerick v. Whitaker, 5 Ky. Opin. 481.

A creditor has the right to recover his goods, as against other attachment creditors, where it is shown that the debtor ordered them in the name of a fictitious firm, and the goods were never taken from the depot, and the debtor was insolvent at the time.

Gaylord & Co. v. O'Bryan, 3 Ky. Opin. 685.

The wife having been left in the possession of the property, she had the right to protect and defend it for her husband, and her claim of its exemption from attachment made in her answer should have been respected.

Pigg v. Yates, 1 Ky. Opin. 299.

§ 295. Time for interposing claim to property.

If property of a deceased person has been attached and sold under the attachment, it is too late for the personal representative of the deceased to establish his claim to the property for rent due the deceased prior to the attachment.

Sinton v. Pope, 7 Ky. Opin. 332.

§ 298. Security by claimant for possession.

A claimant's bond, providing that the parties will perform the judgment of the court, or have the property bonded, forthcoming to satisfy same, does not authorize the assessment against same of the 10 per centum damages in case the claim be unfounded.

Hoskins v. Murphy, 4 Ky. Opin. 338.

§ 301. Proceedings for establishment and determination of claims to property.

§ 304.—Parties.

Where the claimants of attached property sued in the firm name alone, they may be required by motion or rule to give the individual names of the members of the firm.

Cozine & Bro. v. Kennedy, 6 Ky. Opin. 706.

§ 306.—Pleading.

Where the claimants of attached property sued in the firm name alone, the defect must be taken advantage of by demurrer, answer or motion, or

it will be waived, and objection when taken must appear of record.

Cozine & Bro. v. Kennedy, 6 Ky. Opin. 706.

Under the Civil Code, any one claiming property attached may, by petition, have himself made a party to the suit, and have his rights adjudicated.

McCulloch v. Gallagher, 1 Ky. Opin. 164.

Where one comes into suit in attachment for the sole purpose of asserting his claim to the property, a reply to his answer is not necessary.

Spradlin v. Pieratt, 6 Ky. Opin. 522.

X. LIABILITIES ON BONDS OR UNDERTAKINGS.

§ 330. Accrual or release of liability by breach or fulfillment of conditions.

§ 331.—Bonds or undertakings to procure attachment.

Where an attachment is levied in June and held until the following January when the suit was dismissed, and during that period some of the property was injured and lost, the bondsmen are liable for such damages.

Graffenried v. Rice, 10 Ky. Opin. 421.

In an action on an attachment bond, the inquiry is as to whether the attachment was wrongfully obtained, and in proving such fact an order dismissing an attachment is prima facie evidence of its wrongful obtention; and if the suit is terminated by a finding in favor of the defendant, on an issue as to the truth of the facts alleged as ground for attachment, the judgment will conclusively establish that the attachment was wrongfully obtained.

Miller v. McCrory, White & Co., 11 Ky. Opin. 625.

§ 334.—Bonds or undertakings to discharge attachment.

A person who has executed a bond to perform the judgment of the court thereby discharges the attachment and becomes liable on his bond.

Graham v. Sheets, 9 Ky. Opin. 701.

§ 336. Rights and remedies of sureties.
The sureties on an attachment bond

may be estopped from denying their liability on the bond, but they are not estopped from denying that the plaintiff has adopted the proper remedy of charging them with liability.

Kerty & Hasny v. Miles, 6 Ky. Opin. 609.

In a suit by appellant on an attachment bond it is held that appellee, surety on the said bond, is not liable because the covenant was to appellant and another jointly.

Curl v. Trimble, 1 Ky. Opin. 195.

§ 337. Discharge of sureties.

The sureties in an undertaking in attachment proceedings can not be held liable after reversal of the judgment in the case.

Oglevie v. Wiley, 6 Ky. Opin. 460.

A plaintiff in attachment can not escape responsibility and relieve his sureties on their bond, by voluntarily dismissing his action; as the court should first have a jury assess the damages, before such dismissal.

Keith v. Wilson, 3 Ky. Opin. 672.

§ 338. Extent of liability.

By executing the statutory attachment bond, a surety places himself in a condition that when called on for the money he is not allowed the right to replevy, but must respond with either the money or the property.

Kerty & Hasny v. Miles, 6 Ky. Opin. 609.

§ 340. Summary remedies.

In enforcing an attachment bond by rule, it is not necessary that the surety in response to the rule should urge that it was not a statutory bond, where such fact is made to appear from the record.

Kerty & Hasny v. Miles, 6 Ky. Opin. 609.

The provisions of the Code must be complied with before the Court of Appeals will permit attachment plaintiff to resort to the harsh and summary method of enforcing the bond by rule.

Kerty & Hasny v. Miles, 6 Ky. Opin. 609.

§ 341. Actions.

In a suit upon a forthcoming bond for goods attached, the obligors are estopped from denying admissions in

the bond, as controverting their existence.

Garrett v. Phillips, 5 Ky. Opin. 624.

§ 345.—Defenses.

Where an attachment is obtained by an administrator; and an attachment bond executed by the administrator and another, they are both individually liable on the bond, and the objection that the party is not declared against as administrator is not available.

Woodsmall v. Keas, 7 Ky. Opin. 275.

§ 350.—Evidence.

To recover on an attachment bond, it is not required that the bond should show on its face that it was approved, since the taking of an attachment bond amounts to an approval by the officer, and the parties are bound by it.

Gray v. Sheets, 10 Ky. Opin. 244.

§ 351.—Damages.

Punitive damages can not be recovered in a suit on an attachment bond, except upon proof showing that obtaining the attachment was malicious and without probable cause.

Jackson v. Graves, 8 Ky. Opin. 380.

Where, in a suit on an attachment bond, the plaintiff fails to show that defendant in obtaining the attachment acted with malice and without probable cause, but where the attachment was dissolved solely on the weight of the evidence, the measure of damages that may be recovered is the damage to his property by reason of the seizure or such actual damages as was the result of the seizure.

Jackson v. Graves, 8 Ky. Opin. 380.

XI. WRONGFUL ATTACHMENT.

§ 355. Nature and grounds of liability.

After recovery of a judgment for wrongful conversion of property, the plaintiff will not be estopped to have a sale of lands made under the original attachment set aside, unless the amount of the judgment has been actually paid.

Anderson's Heirs v. Lusk, 3 Ky. Opin. 610.

An attachment debtor is entitled to an action for damages against creditors for any sacrifice unnecessarily caused him by wrongful attachment.

Beazley v. Mershon, 3 Ky. Opin. 21.

An improper levy by the sheriff on realty owned by a defendant instead of on his personal property, is no defense to an attachment suit, the remedy of the party aggrieved being against the sheriff for making an improper levy.

Turner v. Alley, 2 Ky. Opin. 252.

§ 365. Persons entitled to damages.

A plaintiff who causes an attachment to issue and property to be sold not belonging to the defendant, which property the purchaser is required to surrender, is liable to such purchaser for the money paid for such property.

Bruce v. Carlisle, 8 Ky. Opin. 859.

Where one wrongfully causes an officer to levy an attachment on property not owned by the execution defendant, and in which he has no interest, such person is liable to the owner of such property for its value or for the damage sustained by its unlawfully being taken on such levy.

Knox v. Shannon, 11 Ky. Opin. 452.

§ 367. Actions.

§ 373.—Pleading.

Where property has been wrongfully attached no pleading is necessary by the defendant other than a notice stating the grounds upon which the motion to quash the levy is based, since all grounds stand denied, and it being necessary that the party making the motion should establish the grounds by competent testimony.

Campbell & Irvine v. Mitchell, 4 Ky. Opin. 629.

Where the petition fails to allege that the order of attachment under which appellant's property was seized had been discharged or in any way finally disposed of, no cause of action is set out.

Uitz v. Sams, 5 Ky. Opin. 702.

§ 374.—Evidence.

Where appellant sued out an attachment and had it levied on an undivided interest in a store, as the property of

E., who was in the possession of the goods and managing the business; and appellee claimed to be the owner of the goods, and made himself a party to the suit, the burden of proof was on him.

Keith & Co. v. Elliott, 3 Ky. Opin. 627.

If the attachment levied on the goods had the effect to prevent a sale or to injure appellee in his business or to impair his credit, it was proper and legitimate for him to show these facts, but the mere opinion of the witness that the levy of the attachment worked this injury upon appellee, is incompetent; since the witness must state facts such as that his customers have abandoned him, or his credit had been impaired by the merchants refusing to credit him, in order that the jury may form their own opinion.

Brayton v. Spooner, 5 Ky. Opin. 63.

§ 375.—Damages in general.

Recovery for the wrongful suing out of an attachment can only be had for such damages as are natural and proximate, and does not extend to cover supposed losses sustained by a mere derangement of the business.

Veach v. Perkins, 4 Ky. Opin. 97.

The rule is that if the plaintiff has paid or contracted to pay a specified sum he can recover so much thereof as would be a reasonable compensation to his attorney for defending the attachment, and not the original suit, limiting this compensation to one attorney only.

Hardin's Exr. v. Litsey's Exr., 3 Ky. Opin. 381.

§ 380.—Instructions.

An instruction in an attachment proceeding, allowing the jury to assess damages for any remote injury resulting from the interruption of the regular course of the plaintiff's business, is erroneous and misleading.

Veach v. Perkins, 4 Ky. Opin. 97.

§ 383.—Appeal.

Where property attached is shown to belong to another, and the attachment is discharged for that reason by appealing from such judgment and not making the debtor a party to the appeal, the Court of Appeals has no

jurisdiction to inquire into the action of the court in discharging the order of attachment.

Gibson v. Marples, 8 Ky. Opin. 497.

ATTORNEY AND CLIENT.

I. THE OFFICE OF ATTORNEY.

(B) PRIVILEGES, DISABILITIES, AND LIABILITIES.

- § 14. Nature of office in general.
- § 32. Regulation of professional conduct.

II. RETAINER AND AUTHORITY.

- § 64. What constitutes a retainer.
- § 65. Proof of authority.
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III. DUTIES AND LIABILITIES OF ATTORNEY TO CLIENT.

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- § 127. Proceedings for accounting.
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IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) FEES AND OTHER REMUNERATION.

- § 130. Right to compensation in general.
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(B) LIEN.

§ 173. Right to lien.

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Attorney's fees, see Divorce, IV, H.; Wills, § 707.

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Attorney's fees for defending temporary injunction, see Injunction, § 159.

Attorney's fees in action on superseas bond, see Supersedeas, § 8.

Attorney's fees in mortgage foreclosure suit, see Mortgages, § 581.

Authority of attorney to enter appearance for defendant, see Appearance, § 3.

Authority of attorney to stay attachment proceeding, see Attachment, § 184.

Competency as witness, see Witnesses, § 197.

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Employment by trustee, see Trusts, § 313.

Liability for attorney's fees, see Executors and Administrators, § 485.

Liability of garnishee for attorney's fees, see Garnishment, § 191.

Negligence of attorney as ground for new trial, see New Trial, §§ 29, 87.

Provision for attorney's fees, see Bills and Notes, § 110.

Right to recover attorney's fee, see Bills and Notes, § 462.

Suit by guardian, see Guardian and Ward, § 162.

Wife's attorney's fees in suit for divorce, see Divorce, §§ 196, 220.

I. THE OFFICE OF ATTORNEY.

(B) PRIVILEGES, DISABILITIES, AND LIABILITIES.

§ 14. Nature of office in general.

There is no material difference in

the attitude of an attorney who defends an action instituted to set aside a fraudulent deed and the attitude of one who advised and assisted in the execution of the deed.

Dunn v. Bradley, 7 Ky. Opin. 282.

Where an attorney at law gives his client advice by means of which the client's creditors may be defrauded, the attorney is not discharging his duties as an officer of the court, but acts in direct violation thereof, and a promise by the client to pay for such advice will not be implied nor an express promise to pay therefor, be enforced.

Dunn v. Bradley, 6 Ky. Opin. 241.

§ 32. Regulation of professional conduct.

An attorney violates his duty as an officer of the court, in advising or instructing persons applying to him for counsel to attempt a dishonest version of the law, or where the aid of a chancellor is revoked to enable applicant to perpetrate a gross and outrageous fraud.

Dunn v. Bradley, 6 Ky. Opin. 241.

II. RETAINER AND AUTHORITY.

§ 64. What constitutes a retainer.

Acquiescence by a party, for ten years, in payments made to an attorney for her, is presumption of employment of the attorney to make such collections.

Austin v. Bullitt, 3 Ky. Opin. 47.

§ 65. Proof of authority.

§ 69.—Necessity in general.

An attorney employed to sue for and collect a claim of his client is not thereby constituted as an attorney in fact to bid such prices as he might deem best and prudent at a judicial sale of land, to satisfy judgments recovered by his client through him as an attorney at law.

Lashley v. Lackey's Admr., 12 Ky. Opin. 78.

§ 70.—Presumptions.

The mere possession of a note by an attorney at law does not import more than that he has authority to collect.

Keeber v. Henderson, 8 Ky. Opin. 552.

§ 76. Termination of relation.

The relation of attorney and client ceases upon the death of the latter, and the statute of limitation begins to run at that time.

Slack v. Rowlhac, 5 Ky. Opin. 101.

An attorney at law does not, by virtue of his employment to conduct the prosecution or defense of an action in the circuit court, have the right to prosecute an appeal to the Court of Appeals.

May v. Lacy, 8 Ky. Opin. 540.

§ 77. Scope and authority in general.

The mere employment of an attorney by a party does not give the attorney authority to compromise the suit.

Sowards v. Hereford, 7 Ky. Opin. 475.

Where an attorney is employed to collect a debt due his client he has no authority to release sureties thereon.

Stevens v. Chorn, 8 Ky. Opin. 679.

§ 97. Receiving payment or security.

§ 99.—Mode or form of payment or security.

In the absence of a special agreement to the contrary, debts are payable in money, and an attorney receiving an account for collection from his client has no authority to accept in payment any thing in lieu of money, but where an attorney does accept orders, etc., as payment, and the orders are collected by him while he is still representing his client, it will constitute payment.

Snyder v. Harrison, 10 Ky. Opin. 256.

§ 101. Settlements, compromises, and releases.

An attorney at law can not compromise his client's claim in his hands for collection, after obtaining judgment thereon by agreeing to take less than its full amount.

Commonwealth v. Humston, 9 Ky. Opin. 525.

III. DUTIES AND LIABILITIES OF ATTORNEY TO CLIENT.

§ 105. Negligence or malpractice.

Attorneys who took a note for collection, brought suit on the note and

obtained judgment thereon, had execution issued, and the amount of the judgment collected by the deputy sheriff, were held liable to judgment plaintiffs, where the attorneys failed and neglected to collect the money from the sheriff or his deputy, and it was lost to the judgment creditors.

Woods' Admr. v. Mitchell, 6 Ky. Opin. 513.

It is the duty of a defendant to inform the court of the illness of his attorneys, where such facts are within his own knowledge, and to be present in court in person to see that no advantage is taken of him; and in the face of such facts he can not be acquitted of culpable negligence, or indifference and inattention to his interests.

Starks v. Reuben, Lorb & Bloom, 2 Ky. Opin. 59.

§ 106.—Nature of attorney's duty.

It is the duty of an attorney for defendant to insist that the right to the relief as sought by the plaintiff should be established according to the rules of judicial procedure.

Dunn v. Bradley, 7 Ky. Opin. 282.

§ 112.—Conduct of litigation.

It is not within the legitimate professional duties of an attorney at law, within his employment to defend one charged with a crime, to persuade witnesses against defendant not to appear against such defendant.

Farmer v. Howard, 8 Ky. Opin. 582.

§ 113.—Acting for party adversely interested.

An attorney who had brought some of numerous suits by creditors in attachment, should not be appointed to defend other, as it would be contrary to both the letter and spirit of the code.

Owsley v. Cook & Co., 1 Ky. Opin. 518.

§ 116. Accounting and payment to client.

§ 119.—Acts or defaults of partners and associates.

Where attorneys receive accounts for collection and place them in the

hands of another to collect, such other person becomes the agent of such attorneys; and if he collects money thereon and fails to pay it over, such attorneys become liable to pay the same to the owner.

Trabue v. Grover & Parker, 8 Ky. Opin. 77.

§ 122. Dealings between attorney and client.

§ 123.—In general.

The law not only watches over the transactions between attorney and client, but it often interposes to declare such transactions void; and the burden of establishing perfect fairness, adequacy and equity is thrown upon the attorney, and it is not necessary for the client to allege in his petition that the transaction was fraudulent.

Pilant v. Davis, 2 Ky. Opin. 40.

An attorney who purchases from his client a claim in litigation must show that he has dealt fairly with the client, and has taken no advantage of his knowledge of the facts or law in making his contract, or such contract will be canceled.

Conn v. Adair, 9 Ky. Opin. 785.

§ 125. Acquiring property adversely to interest of client.

Where the attorney for defendant purchased the property in suit at execution sale to secure the fees that were due him by his client, he holds the land for the benefit of his client subject to his lien upon it.

Williams v. Wilson, 7 Ky. Opin. 322.

Where an attorney was one of the original plaintiffs and his personal interest was antagonistic to that represented by an administrator, it was impossible for him to protect his individual interests and at the same time discharge his duty as counsel to the administrator.

Foxworthy's Heirs v. Trimble, 5 Ky. Opin. 659.

Where an attorney purchased under an execution issued on the judgment, obtained by him, he purchased for

his client, since whenever an attorney makes his interest in the case conflict with his duty to his client he violates the confidential relation existing between them.

Williams v. Wilson, 7 Ky. Opin. 322.

Where an attorney in good faith redeems the property of his clients from sale, under an agreement from the husband (client) that the attorney will deed the same to the wife, when the charges of redemption are fully paid, if the wife refuses to take conveyance the husband may do so by repaying the attorney the redemption money and expenses, and if the husband fail to make such payments the real estate may be ordered sold to pay such charges.

O'Sullivan v. Heffman's Admr., 9 Ky. Opin. 284.

An attorney representing a client can not be allowed to acquire the property of his client's creditor so as to defeat his client's claim.

McCall v. Bruce, 12 Ky. Opin. 257.

§ 127. Proceedings for accounting.

Where in a suit by a client against her attorney for an accounting and for rents, and to be relieved from a contract and conveyance made to her attorney, induced by his fraud, such client proves facts sufficient to create in the mind of the court a strong suspicion of unfairness, the contract will be set aside or the attorney be decreed to hold in trust for his client, unless he shows clearly that the contract was fairly made and is free from oppression and injustice.

Laws v. Woods, 9 Ky. Opin. 213.

§ 129. Actions for negligence or wrongful acts.

A petition against attorneys for money collected by them and "for the further reason that they had not used due diligence as attorneys," is not sufficiently specific to authorize a recovery for damages on account of negligence.

Trabue v. Grover & Parker, 8 Ky. Opin. 77.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) FEES AND OTHER REMUNERATION.

§ 130. Right to compensation in general.

An attorney acting as a fiduciary is entitled to a reasonable compensation for defending suits against the estate.

Woods v. Thompson, 4 Ky. Opin. 207.

No attorney's fees can be recovered upon, but only interest at ten per cent. before due can be collected on a contract providing: "But in the event of his failure so to pay for two months together he was then to repurchase his stock and pay back to the plaintiff the said sum of \$593.20, with interest, payable monthly from time it was so paid to him, at the rate of 10 per cent. per annum, and in addition thereto one-tenth of one per cent. penalty from the time of failure until paid."

Swain v. Mechanic's Sav. Assn., 10 Ky. Opin. 91.

Where no amount is agreed upon as the fee of an attorney he is entitled to a reasonable fee.

Reid & Stone v. Punch, 10 Ky. Opin. 926.

§ 131. Statutory regulations.

An attorney, under the provisions of Gen. Stat., ch. 5, art. 1, § 15, is entitled to a lien for his fee in an action for damages, but such lien does not attach until there is a recovery in the action and then only upon the judgment.

Stewart v. Louisville & N. R. Co., 11 Ky. Opin. 943.

§ 139. Value of services.

§ 140.—In general.

In determining the value of legal services rendered by an attorney, the magnitude of the case and the importance of the questions involved, as well as the ability and skill of counsel in conducting it, and the benefits the client has derived by reason of the employment, must all enter into

the estimate of the value of such services.

Huston & Mulligan v. Blackwell,
8 Ky. Opin. 439.

In determining the fees due attorneys for services in creating or preserving a fund this court will have recourse to the evidence introduced to show their value, and also to what is shown by the record that they have done.

Gaylord's Trustees v. Nelson & Nelson, 13 Ky. Opin. 1106.

§ 146. Contingent fees.

§ 148.—Construction and operation of contract.

Where one is adjudged to be entitled to a fund collected by an assignee, and the assignee is directed to turn it over to him, he is entitled to all of it, and the assignee can not deduct therefrom sums which he has paid his attorneys in attempting to take the fund from its rightful owner, and where under an employment the attorneys' fees are to depend on the ultimate success of the attorneys in the prosecution of the case, and they do not succeed, nothing is due them.

Shultz's Assignee v. Beatty, 13 Ky. Opin. 319.

Where attorneys under a written contract agree for a per cent. to collect a large claim against a railroad company, they to receive nothing if nothing is collected, the per cent. to be based on the "amount that shall * * * be realized from, or secured to me, of said claim, whether by suit, compromise or otherwise," and they procure judgments and executions, but before they have finally abandoned their efforts, the client forms a syndicate and buys in the railroad and by such speculation finally makes more than the amount of his claim, the attorneys are entitled to their per cent. if in fact it is shown that their services aided in the securing of the money, if not they are entitled to nothing.

Simrall & Bodley v. Mortin, 13 Ky. Opin. 400.

Where attorneys contract to begin and carry on litigation for a percentage of the recovery, and nothing is

recovered, they are entitled to no compensation, unless they were prevented from recovering by the action of their client.

Simrall v. Morton, 13 Ky. Opin. 822.

§ 149.—Performance of contract.

Where it is agreed by a firm of attorneys to represent a plaintiff and sue and recover lands of large value for one-fourth of its value, and in case of their failure to recover the land they were to receive nothing, such a contract requires the attorneys to perform all the services necessary, and they can not claim the whole of the fees stipulated for recovering the land when by reason of the withdrawal of one of the attorneys, it became necessary for plaintiff to employ other attorneys to perform a part of the services.

Percifull v. Wilson's Heirs, 11 Ky. Opin. 545.

§ 155. Allowance and payment from funds in court.

Where attorneys are employed by one claiming a reversionary title to property and the attorneys are successful in prosecuting the claim, but before the fund is actually received by the claimant his assignees bring action against him to recover the fund, they can not prevent the attorneys of the claimant from being paid out of the fund by asserting that it has always belonged to the assignees and that they did not employ the attorneys.

Gaylord's Trustees v. Nelson & Nelson, 13 Ky. Opin. 1106.

§ 157. Actions for compensation.

§ 167.—Trial.

Where the employment of an attorney is fully proven, and he was to have a reasonable fee, it is for the jury alone to determine what the services are worth.

Rudd v. Weisinger, 5 Ky. Opin. 567.

(B) LIEN.

§ 173. Right to lien.

§ 174.—In general.

The court may properly adjudge attorneys, who procured a judgment for

damages, a prior lien on the judgment for the services rendered.

Mercer v. Henderson, 7 Ky. Opin. 448.

Where two causes of action are joined in one petition only one attorney's fee can be taxed against the defendant.

Stemmell v. Wartens, 2 Ky. Opin. 211.

The attorney for the debtor is entitled to a superior lien for a reasonable attorney fee, on the rents accruing on the attached land, from the time the debtor was dispossessed until the second valid sale.

Bradley v. Bradley, 3 Ky. Opin. 68.

An attorney has a lien on a claim placed in his hands for collection, and he may resist the dismissal in pursuance of an agreement of his client, but this does not authorize a judgment in disregard of the release pleaded.

Gummiel v. Luke, 3 Ky. Opin. 588.

An attorney has a statutory lien on the fund in litigation, and an order for paying his allowance out of that fund is not erroneous.

Ballard v. Turner, 3 Ky. Opin. 648.

An attorney has a lien upon all choses in action, accounts or other claims or demands put in his hands for suit or collection and upon the judgments recovered, but he is not entitled to a lien where he represents a defendant in a suit to set aside a conveyance as fraudulent against creditors, where the judgment dismissed the action only.

Phelps & Co. v. Loving & Co., 5 Ky. Opin. 271.

Where a demand is not for the recovery of incidental damages, but for property, and a claim in money on which \$200 was paid on a compromise judgment, the appellee had a lien thereon for his fee as the plaintiff's attorney, of which the pendency of the suit was notice to the defendant.

Cord v. Glasscock, 5 Ky. Opin. 7.

An attorney has a lien on choses in action or other claims or demands put in his hands for collection which cannot be defeated by a compromise between the parties, and a purchaser takes the property subject to the attorney's lien for a reasonable fee.

Gunnell's Curator v. Luke, 5 Ky. Opin. 626.

Under the laws of Indiana, an attorney may secure a lien on a judgment procured for his client by endorsing a notice thereof on the judgment when entered, and a resident of Kentucky, becoming a suitor in Indiana, must stand upon the same ground with a citizen of that state, so far as that litigation and its consequences are concerned.

Rankin's Exrs. v. Davidson, 10 Ky. Opin. 342.

A claim in litigation both before and after judgment is subject to an attorney's lien in the hands of the debtor, and such a lien cannot be defeated by the defendant paying the amount of the judgment to the plaintiff.

Reid & Stone v. Punch, 10 Ky. Opin. 926.

Where a conveyance has been made and the contract of sale fully executed, an action by the grantor to rescind, if defeated, can not amount to a recovery of the land by the grantee; nor would a recovery by the grantee, on a note that the grantor had given as an additional consideration for the purchase by the grantee, give to the attorneys a lien on the land.

Eginton v. Rusk, 11 Ky. Opin. 537.

Where an attorney's client is merely a defendant to the action, not asserting affirmative relief, but resisting a recovery of property to which he has title, and the claim of the plaintiff is denied, no lien exists on the property in controversy for the attorney defending.

Edginton v. Rusk, 11 Ky. Opin. 537.

§ 182. Subject-matter to which lien attaches.

Where the husband employs an at-

torney for himself, and not for his wife, his wife's real estate is not liable to be sold to pay such attorney's fees.

Cundiff v. Rodman, 9 Ky. Opin. 386.

Where attorneys are employed to contest a will, and their employment results in defeating the will, they have no lien on the property which descends to the heirs for their compensation, since they recover nothing upon which a lien could attach.

Cundiff v. Rodman, 9 Ky. Opin. 386.

Where attorneys are employed and their efforts result in creating a fund, they have a lien upon it for the reasonable value of their services.

Gaylor's Trustees v. Nelson & Nelson, 13 Ky. Opin. 1106.

§ 184. Priorities.

After a suit in attachment is filed and an attachment is levied on the property, a lien by an attorney in a suit on a note is subordinate to the attachment lien.

McAfee v. Rurrack & Smith, 10 Ky. Opin. 812.

§ 186. Waiver, loss, or discharge.

Where parties are entitled to a lien on a judgment, but stand by and permit the judgment to be executed upon the land sold and purchase money notes to be bought by an innocent purchaser, they will be held to have waived their lien by failure to enforce it in time.

Rieke Bros. v. Stron, 10 Ky. Opin. 159.

§ 188. Protection against settlement between parties.

Where a judgment is taken against a litigant, upon which judgment the attorney securing it has endorsed a lien as provided by the laws of Indiana, the judgment debtor who pays the judgment to his adversary, if the attorney be not paid, may have to pay the amount of such lien.

Rankin's Exrs. v. Davidson, 10 Ky. Opin. 342.

ATTORNEY'S FEES.

See Attorney and Client, § 146.

Liability for, see Executors and Administrators, § 485.

Liability of garnishee for, see Garnishment, § 191.

Right to recover, see Bills and Notes, § 462.

ATTORNMENr.

See Landlord and Tenant, § 15.

AUCTIONS AND AUCTIONEERS.

§ 8. Rights and liabilities of seller and buyer.

§ 9. Liabilities of Auctioneer.

§ 8. Rights and liabilities of seller and buyer.

Where at an auction sale the auctioneer makes representations as to the title or as to the character of the goods sold, and thereby induced one to purchase on the faith of such representations, the principal will be held responsible for any injury resulting to the purchaser because of such representations.

Hoadly v. Vandergrift, 7 Ky. Opin. 85.

Where property sold by an auctioneer is of no value, on account of unsoundness at the time of the sale, there is a total failure of consideration which exonerates the purchaser from liability.

Aulick v. Edwards, 3 Ky. Opin. 606.

Where land is sold at public auction and it is announced by the auctioneer that it is sold subject to a dower interest, the purchaser has no right to have the deed reformed so as to contain a warranty of title, in order that he may recover thereon.

Mattingly's Admr. v. Graves, 5 Ky. Opin. 603.

Appellant's loss of right to redeem property held to have resulted from his negligence.

Bowling v. Adkins, 6 Ky. Opin. 58.

Where a bidder at auction sale relied on the advice of a friend in the purchase of the property rather than on the statements of the auctioneer, he has no cause to complain against the vendor of the land, in case it turns out that the title to the land is not clear.

Hoadly v. Vandergrift, 7 Ky. Opin. 85.

When a sale of personal property is public and competition unrestrained, the knowledge of the party selling the property that the purchaser intends to hold it for another, and to protect it from his creditors, will not enable the purchaser to avoid payment of his note executed for the purchase price of said property.

Covert v. Bethel, 10 Ky. Opin. 50.

Where a lot of hogs are sold at public auction and the auctioneer announces at the sale that hogs would be sold without any warranty of soundness, but that any questions asked as to the property would be truthfully answered as far as was known, and the auctioneer promised that the owner would tell all she knew about the hogs, and it is shown that the owner knew that the hogs had the cholera, or that the lot of which the hogs in dispute were a part had it, it was her duty to disclose such fact to a purchaser, and having failed to do so she cannot collect the purchase price of such hogs.

Miller v. Gorham's Admx., 10 Ky. Opin. 191.

§ 9. Liabilities of auctioneer.

If an auctioneer warrants the soundness of the property sold by him, his act is that of the seller, and if that does not imply a warranty, it would be constructively fraudulent, for to affirm as a fact that which is false, whether known to be so or not, is, in law, a fraud.

Aulick v. Edwards, 3 Ky. Opin. 606.

AUTHORITY.

Express authority of agent, see Principal and Agent, § 95.

Implied authority of agent, see Principal and Agent, § 98.

Of agent, see Principal and Agent, § 49.

Of agent to collect for principal, see Principal and Agent, § 64.

Of assessor to hear complaints of taxpayers, see Taxation, § 465.

Of attorney employed to collect debt, see Attorney and Client, § 77.

Of attorney to compromise suit, see Attorney and Client, § 77.

Of corporate officers, see Corporations VI, B.

Of co-tenants, see Tenancy in Common, § 39.

Of directors of corporation, see Corporations, § 297.

Of executor to convey land of testator, see Executors and Administrators, § 394.

Of guardian or committee of insane person, see Insane Persons, § 40.

Of mining corporation to subscribe for stock of railroad company, see Corporations, § 399.

Of partner, see Partnership, §§ 79, 126.

Of receiver, see Receivers, § 82.

Of trustee, see Trusts, § 171.

Possession of note by attorney, see Attorney and Client, § 65.

Revocation of brokers' authority, see Brokers, § 44.

To alter note, see Alteration of Instruments, § 12.

To arrest without warrant, see Arrest, § 61.

To sell under execution, see Execution, § 215.

Under brokerage contract, see Brokers, § 12.

AVOIDANCE.

Confession and avoidance, see Pleading, § 178.

Of contract by infant, see Infants, § 31.

Pleading matter in avoidance, see Pleading, III. D.

AVOWAL.

As to testimony expected to be adduced, see Exceptions, Bill of, § 11; Trial, § 46.

AWARD.

See Arbitration and Award.

Appeal from, see Arbitration and Award, § 85.
 Collateral attack on, see Arbitration and Award, § 79.
 Conclusiveness of, see Arbitration and Award, § 82.
 Delivery of copies of, see Arbitration and Award, § 54.
 Formal requisites of, see Arbitration and Award, § 49.
 Impeachment or vacation of, see Arbitration and Award, § 75.
 Setting aside by court, see Arbitration and Award, § 75.
 Sufficiency of, see Arbitration and Award, § 56.

BAGGAGE.

Liability of carrier for loss or injury to, see Carriers, § 132.

BAIL.

I. IN CIVIL ACTIONS.

- § 9. Bond, undertaking, or recognizance.
- § 11.—Requisites and validity in general.
- § 25. Action or scire facias on bond, undertaking, or recognizance.
- § 28.—Defenses.

II. IN CRIMINAL PROSECUTIONS.

- § 41. Right to release on bail.
- § 49. Proceedings to admit to bail.
- § 50. Amount of bail.
- § 54. Bond, undertaking or recognizance.
- § 55.—Defects in antecedent proceedings.
- § 63. Bond, undertaking, or recognizance on appeal.
- § 68.—Conditions and obligations.
- § 73. Deposit in lieu of bail.
- § 74. Discharge of sureties.
- § 75. Breach or fulfillment of condition of bond, undertaking or recognizance.
- § 77. Proceedings for fixing liability or forfeiture.
- § 78. Relief from liability or forfeiture.
- § 79.—In general.
- § 80.—Surrender of principal.
- § 81. Action or scire facias on bond, undertaking, or recognizance.

§ 82.—Nature and form of remedy.

§ 83.—Right of action.

§ 88.—Process and appearance.

§ 93.—Judgment and enforcement thereof.

I. IN CIVIL ACTIONS.

§ 9. Bond, undertaking, or recognizance.

§ 11.—Requisites and validity in general.

Where a justice of the peace, in an examining court, has adjudged the accused guilty and caused him to execute a bail-bond for his appearance, a second bond as a result of a second examination by other justices for the same offense between the same parties, is void.

Hendricks v. Commonwealth, 7 Ky. Opin. 328.

§ 25. Action or scire facias on bond, undertaking, or recognizance.

§ 28.—Defenses.

Where it is not determined by the justices whether a charge against an accused is for grand or petit larceny, but they approve a bail bond, and the prisoner gave the bond and was released from custody, his surety will not be allowed to say that the accused had committed or was afterward charged with a greater offense, and that the bond is therefore void.

Commonwealth v. Lester, 10 Ky. Opin. 680.

A discharge in bankruptcy is not a defense to a suit on a bail bond, for the bankruptcy law does not apply to a debt due the state or to the federal government and Congress has not the power, by tax or exemption, to burden the instruments of the state government.

Commonwealth v. McMillan, 10 Ky. Opin. 699.

Discharge in bankruptcy can not be pleaded as a defense by a surety on a bail bond.

Commonwealth v. Anderson, 10 Ky. Opin. 701.

II. IN CRIMINAL PROSECUTIONS.

§ 41. Right to release on bail.

Where, after appellant's case was reversed and before the mandate of

the Court of Appeals was filed the county judge admitted the defendant to bail which he forfeited, and this action was instituted against his bondsman for the purpose of collecting the amount of the bond; after conviction, a defendant can not be admitted to bail, and the county judge had no authority to admit the defendant to bail, although the judgment against him had been reversed, and the mandate should have been entered and the court rendering the judgment could alone discharge the prisoner from custody, the bond taken by the county judge being unauthorized and void.

Spillman v. Commonwealth, 5 Ky. Opin. 134.

After the accused has been committed and there has been a term of the circuit court, the clerk of that court, in the absence of the judge may take bail, and where there is a commitment by the court and the amount of bail is fixed the clerk may take the bail in the absence of the judge.

Spillman v. Commonwealth, 5 Ky. Opin. 134.

§ 49. Proceedings to admit to bail.

The clerk of the circuit court has no authority to take bail in cases where the accused has not been in the custody of the circuit court.

Commonwealth v. Taylor, 5 Ky. Opin. 200.

When a defendant in a criminal cause is convicted before the magistrate, and in default of bond is remanded to the custody of the jailer, if he desires to give bond after that time he can only legally do so by written petition to the court indicating the persons offered as bail.

Commonwealth v. Ashenhurst, 9 Ky. Opin. 935.

§ 50. Amount of bail.

Where two days after the examining trial, the court changed its order of bail by increasing the amount from \$500 to \$1,000, the act was without his jurisdiction and without authority of law or judicial warrant.

Holt v. Commonwealth, 4 Ky. Opin. 143.

A bail bond can not be changed after the examining trial, and a bond taken for a larger amount than that fixed at the trial is null and void.

Holt v. Commonwealth, 4 Ky. Opin. 143.

§ 54. Bond, undertaking or recognizance.

A bond that the defendant should appear to answer the charge of larceny, and not to depart without leave of court, is good against the sureties, though the indictment be quashed.

Hazlerigg v. Commonwealth, 3 Ky. Opin. 719.

In accepting a bail bond after commitment, the committing magistrate or county judge acts as a ministerial, and not as a judicial, officer, and has no power to modify or revise such judgments or orders.

Holt v. Commonwealth, 4 Ky. Opin. 143.

A bail bond is not sufficient which fails to stipulate a court in which the defendant is required to appear.

Commonwealth v. Peyton, 4 Ky. Opin. 609.

Bail may be taken by the clerk of the circuit court in cases in which the accused has been committed to jail by the circuit court, and then only after the term has expired and in the absence of the judge.

Commonwealth v. Taylor, 5 Ky. Opin. 200.

Where defendant was taken before an examining court, charged with four distinct offenses, and after investigation he was committed on all of them, and subsequently was admitted to bail by the county judge, a separate bond in each case shall be taken.

Dunning v. Commonwealth, 5 Ky. Opin. 173.

§ 55.—Defects in antecedent proceedings.

To admit one to bail is to make an order to discharge a prisoner from actual custody on bail, and the court must make the order in writing; and where it has not been done so there is nothing to show that a defendant ever was discharged from custody on bail, and bail bonds taken in any

other way than as prescribed by the statute are not enforceable.

Commonwealth v. Ashenhurst, 9 Ky. Opin. 935.

To enable the commonwealth to recover on a forfeited bail bond it is only necessary to show that there has been a substantial compliance with the provisions of the statute in regard to giving and accepting bail.

Wilson v. Commonwealth, 10 Ky. Opin. 5.

Where one accused of crime in an examining court is committed to jail in default of bail, the amount being fixed at \$1,200, and no record appears showing its reduction or that he was discharged by reason of the execution of the bond, and nothing appears in the record to show any authority for taking a bond from him in the sum of \$800, but it is sought to hold a surety on such a bond, the bond should be quashed.

Keetes v. Commonwealth, 10 Ky. Opin. 177.

Where one is indicted and arrested for keeping a disorderly house, and after arrest executed bail bonds and was discharged, it is error for the court to quash the bonds and release the defendant, because of the accidental omission of the word "Fulton" before the words "circuit court," since such omission does not invalidate the bonds.

Commonwealth v. Stegala, 11 Ky. Opin. 533.

§ 63. Bond, undertaking, or recognizance on appeal.

Under §§ 61, 67 and 80, Crim. Code, the county judge has the right to take a bail bond, when the defendant was legally in custody and charged with a public offense, this right extending to any time before the commencement of the first term of the circuit court after commitment.

Greer v. Arnette, 4 Ky. Opin. 444.

Where a bond for appearance of a defendant, is blank as to amount, no penalty is annexed to the condition, and the principal in such bond is not liable thereon.

Minter v. Commonwealth, 4 Ky. Opin. 524.

It is not necessary to the validity of a bail bond that the officer before whom it is executed shall subscribe his name as a witness thereto.

Hill v. Commonwealth, 4 Ky. Opin. 612.

§ 68.—Conditions and obligations.

Under § 10, Crim. Code, where a bail bond fixes no time for the appearance of defendant in court, he is bound to appear and surrender himself to the custody of the court for examination within twenty days from the date of the bond.

Wilson v. Commonwealth, 6 Ky. Opin. 705.

The obligation of one who acknowledged himself bound on a bail bond is that he will have his principal in court, and he can not escape liability by showing that his appearance in court was prevented by his being lawfully arrested by the United States government.

Commonwealth v. House, 9 Ky. Opin. 524.

§ 73. Deposit in lieu of bail.

Money may be paid to the trustee of the jury fund, and a certificate of such payment be filed with the clerk in lieu of bail in a criminal case; and the money thus deposited belongs to the defendant where he pays it, and by surrendering himself into custody at any time he is entitled to the money, and the clerk must pay it out on his order.

Commonwealth v. De Pane, 8 Ky. Opin. 243.

§ 74. Discharge of sureties.

The quashal of an indictment does not discharge the defendant from the custody of the court.

Hazlerigg v. Commonwealth, 3 Ky. Opin. 719.

A trial is begun when the jury is impaneled, and if the indictment is dismissed and resubmitted to the grand jury, the surety on the appearance bond is thereby released.

Commonwealth v. Perry, 4 Ky. Opin. 611.

Where a surety is indemnified against loss by reason of the forfeiture of a bail bond, he is entitled to re-

cover against the indemnitor all the expenses incurred in the recapture of the defendant, including the amount of the reward paid to the parties apprehending and arresting the criminal.

Donahue v. Thomas, 5 Ky. Opin. 637.

Where a charge of assault and battery is made, and a surety signs a recognizance bond, and afterwards the charge is changed, charging a felony, the surety is not liable in case of default, but where the first charge is amended after bond given but no new or higher offense is charged, such surety is still bound.

Crutcher v. Commonwealth, 8 Ky. Opin. 282.

To release a bondsman on a bail bond, the bondsman at any time before a forfeiture may surrender the defendant to the jailer of the county in which the offense was committed, accompanied with a certified copy of the bail bond to be delivered to the jailer who must detain the defendant and give a written acknowledgment of the surrender.

Commonwealth v. Norton, 8 Ky. Opin. 472.

When a defendant, after his cause has been submitted to the jury, was, by order of the court, remanded to the custody of the jailer, the sureties are released and can not bind themselves to further stand on the bond.

Grimes v. Commonwealth, 8 Ky. Opin. 741.

One who has signed a bail bond is not discharged from liability thereon by surrendering the prisoner to the sheriff, when such surrender is not accompanied with a certified copy of the bail bond as required by the statute.

Coleman v. Commonwealth, 9 Ky. Opin. 160.

When a person arrested pursuant to a bench warrant, after giving bail bond, surrendered himself to the sheriff, the conditions of the bail bond are fully complied with and the person signing such bail bond is released.

Commonwealth v. Harvis, 9 Ky. Opin. 236.

§ 75. Breach or fulfillment of condition of bond, undertaking or recognizance.

The mere failure of the defendant to be present in court at the time the prosecution against him terminated does not constitute a breach of the bond.

Harris & Kilby v. Commonwealth, 7 Ky. Opin. 346.

It is the duty of a defendant to be present in court and take notice of steps taken in his case, and if he fails to appear in the court below and object to an order of forfeiture, it will not be assumed that the order was erroneous because it does not recite that the defendant was called.

Newton v. Commonwealth, 1 Ky. Opin. 565.

If a defendant appears in court in compliance with the bond executed in an examining court and enters into a recognizance to appear at the next term of the circuit court, his former bond is discharged.

Newton v. Commonwealth, 1 Ky. Opin. 565.

A party having appeared in court, as required in a bond, and having been released on his own recognizance, his sureties on the bond were released from any obligation.

Commonwealth v. Bassett, 1 Ky. Opin. 362.

Where a person accused of crime fails to comply with his bond the court is required to direct the fact to be entered on the record, and thereupon the bail bond is forfeited, and the clerk has no authority, before an order of forfeiture, to dispose of it as required by law in case of forfeiture, and there is no right of recovery on such a bond until after forfeiture is ordered.

Blankenship v. Commonwealth, 10 Ky. Opin. 289.

§ 77. Proceedings for fixing liability or forfeiture.

The accused must be in the custody of the court before a remission will be made on a forfeited recognizance.

Commonwealth v. Sheritt, 3 Ky. Opin. 421.

In a proceeding upon the forfeiture of a bail bond, it may be shown, by

parol evidence, if agreed to, that the defendant surrendered himself into the custody of the court at the next term after the forfeiture was entered and that the indictment was dismissed and the prisoner discharged, which order was not entered of record at the time, and such order may be entered *nunc pro tunc*.

Commonwealth v. Sheritt, 5 Ky. Opin. 743.

§ 78. Relief from liability or forfeiture.

§ 79.—In general.

A bail bond stipulating for the appearance of the defendant at any other than the next term after its execution thereof will be quashed.

Commonwealth v. Bracken, 1 Ky. Opin. 451.

It is no defense to an action by a surety to recover money paid on a forfeited recognizance, that the principal at the time of the forfeiture was under arrest and in the custody of the officers of the U. S. government.

Radford v. Radford, 3 Ky. Opin. 419.

After an indictment is filed away the bondsman of the defendant may cause his arrest and delivery to the jailer.

Botts v. Commonwealth, 4 Ky. Opin. 610.

Where the record does not show that any order was made directing the sheriff to take charge of the prisoner, presumption thereof may arise from the acts of the judge.

Commonwealth v. Lewis, 5 Ky. Opin. 249.

Pursuant to Crim. Code, § 94, if the defendants in a suit on a forfeited recognizance before judgment is entered surrendering the defendant into court, the court has power to remit the whole or a part of the sum named in the bail bond; but setting up in an answer that they are willing to arrest the accused is not equivalent to actual surrender.

O'Daniel v. Commonwealth, 8 Ky. Opin. 125.

The court in its discretion may remit a forfeiture under a paragraph of answer showing that as soon as the

forfeiture on a bail bond was declared the surety proceeded to have the accused arrested and surrendered to the jailor, and praying the court to remit the forfeiture.

Commonwealth v. Anderson, 10 Ky. Opin. 701.

§ 80.—Surrender of principal.

To exonerate a bail his delivery of the prisoner to the jailer must be such as to give the jailer dominion over the accused and this can ordinarily only be done by putting the accused in the jail.

McKinney v. Commonwealth, 11 Ky. Opin. 348.

§ 81. Action or scire facias on bond, undertaking, or recognizance.

A pardon granted to the principal, by the executive of the state before trial, is a good defense on trial of a forfeited bail bond.

Commonwealth v. Sloan, 3 Ky. Opin. 79.

§ 82.—Nature and form of remedy.

A proceeding to forfeit a bail bond is a civil proceeding, and is entirely different from the prosecution against the principal; it is against more than one person, and the judge not qualified to try the criminal case may try and determine the civil case.

Shaffner v. Commonwealth, 10 Ky. Opin. 329.

§ 83.—Right of action.

Before a bail bond can be enforced it must be shown that the accused was legally in custody, charged with a public offense, and that he was discharged by reason of the giving of the recognizance or bond.

Commonwealth v. Bordus, 11 Ky. Opin. 17.

§ 88.—Process and appearance.

The fact that the defendant was prevented by military power, against his will, from appearing before the adjudged forfeiture, presents a good defense and it was error to sustain a demurrer to the answer.

Vincent v. Commonwealth, 1 Ky. Opin. 452.

§ 93.—Judgment and enforcement thereof.

In misdemeanor cases the object in requiring bail being to secure the per-

formance of any judgment which may be rendered against the offender, it is error to render judgment for an amount greater than the fine imposed, and costs of court, not exceeding the amount of the recognizance; and the court may order any money deposited agreeably in the line of such bail, to be applied to the payment of such fine and costs.

McClure's Exr. v. Commonwealth, 1 Ky. Opin. 423.

Where there is no bond in the circuit court nor any minutes from an examining court filed in the circuit court, no forfeiture on a bond can be decreed.

Commonwealth v. Barents, 11 Ky. Opin. 353.

BAILMENT.

- § 1. Nature and elements in general.
- § 5. Delivery and acceptance.
- § 6. Title and right to property.
- § 10. Care and use of property, and negligence of bailee.
- § 12.—Bailments for sole benefit of bailor.
- § 13.—Bailments for mutual benefit.
- § 19. Reimbursement and indemnity of bailee.
- § 20. Compensation of bailor for use of property.

Compensation of bailee, see Partnership, § 173.

§ 1. Nature and elements in general.

Where money is to be paid, and the identical thing in an altered form is not to be restored but merely pledged as a security for the money, such a contract is a sale, and not a bailment.

Morris v. Hayner & Dunlevy, 4 Ky. Opin. 556.

§ 5. Delivery and acceptance.

Where property is placed by its owner in the hands of another person for his own accommodation, the bailee is not responsible to the bailor, unless loss occurs through his negligence.

Carter v. Hazelrigg's Admr., 5 Ky. Opin. 194.

§ 6. Title and rights to property.

The mere leaving of personal property with a bailee will not invest him presumptively with ownership.

Kash v. Fitzpatrick & Looney, 3 Ky. Opin. 36.

A bailee of personal property holds only a special title thereto, so long as he has possession thereof and his special rights and responsibilities end, when the property is taken from him by others than the bailor.

Kash v. Fitzpatrick & Looney, 3 Ky. Opin. 36.

A bailee, for hire, of property for a specified period, if deprived of the use thereof by a superior title, or by the act of law, may resort to the implied warranty of undisturbed possession for the term.

Hood v. Yowel, 3 Ky. Opin. 357.

If in the exercise of eminent domain or other power in the government, it takes the property, it thereby becomes responsible to the holder of the title for its value, but not to the bailee for a term.

Hood v. Yowel, 3 Ky. Opin. 357.

§ 10. Care and use of property, and negligence of bailee.

Where appellant loaned the appellee his horse on condition that he was not to take him beyond G., which agreement the bailee violated, and the horse was killed, the bailee is responsible for the value of the horse, although the death was not the result of carelessness or negligence upon his part.

Logan v. Logan, 4 Ky. Opin. 177.

Where a steamer undertook the transportation of a package without receiving or expecting compensation therefor, its relation to the owner was that of a mere bailee and was not liable for the loss of the package unless it resulted from its negligence or the negligence of its agents or servants.

Hawkins v. Lee, 6 Ky. Opin. 390.

§ 12.—Bailments for sole benefit of bailor.

The owner of a steamer, in transporting freight, a package containing plaintiff's money, free of charge, was held to act as a gratuitous bailee only, and was not liable for its loss, unless

the loss resulted from the negligence of the owner of the steamer or his agents or servants.

Hawkins v. Lee, 6 Ky. Opin. 156.

§ 13.—Bailments for mutual benefit.

One who hires a horse of another contracts to take good and reasonable care of the horse and to supply the same with suitable food during the time of the hiring.

Draper v. Muntz, 9 Ky. Opin. 872.

§ 19. Reimbursement and indemnity of bailee.

A bailee who has the custody of property, upon notifying the owners to remove same, and they fail to do so, is entitled to compensation for removal and storage.

Fletcher v. Cain, 3 Ky. Opin. 291.

§ 20. Compensation of bailor for use of property.

Where suit was brought to recover on a contract to pay the owner of a stallion for the use of him for a certain period for breeding purposes, and failure of consideration is pleaded thereto, in that the stallion was almost wholly unable to produce colts, and that he was utterly worthless for the purpose for which he was hired, and the proof sustains such averments, there can be no recovery, since there was an implied warranty on the part of the owner of the stallion that he was suitable for the purposes contemplated by the contract.

Piper v. Ringo, 9 Ky. Opin. 300.

BANKRUPTCY.

II. PETITION, ADJUDICATION, WARRANT, AND CUSTODY OF PROPERTY.

(A) JURISDICTION AND COURSE OF PROCEDURE IN GENERAL.

§ 11. Jurisdiction of courts of bankruptcy in general.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(A) APPOINTMENT, QUALIFICATION, AND TENURE OF TRUSTEE.

§ 118. Office of trustee.

(B) ASSIGNMENT, AND TITLE, RIGHTS, AND REMEDIES OF TRUSTEE IN GENERAL.

§ 137. Property and rights vesting in trustee.

§ 138.—Personal property in general.

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§ 158. Preferences voidable.

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(B) APPEAL.

§ 460. Parties.

See Insolvency.

Attachment of fund in hands of assignee in bankruptcy, see Attachment, § 31.

Discharge in bankruptcy not a defense in action on bail bond, see Bail, § 28.

Effect of petition in bankruptcy on prior attachment, see Attachment, § 226.

Liability of bankruptcy court for mistake in passing on claim, see Courts, § 135.

Promise of discharged bankrupt to pay discharged debt, see Contract, § 54.

Right of assignee in bankruptcy to be made party to proceedings for judicial sale, see Judicial Sales, § 3.

Right to prosecute appeal, see Appeal, § 322.

When jurisdiction of state court not affected, see Assignments for Benefit of Creditors, § 274.

II. PETITION, ADJUDICATION, WARRANT AND CUSTODY OF PROPERTY.

(A) JURISDICTION AND COURSE OF PROCEDURE IN GENERAL.

§ 11. Jurisdiction of courts of bankruptcy in general.

Where the court has jurisdiction of a proceeding for the sale of real estate before the bankruptcy of the defendant, it may legally pronounce judgment or order a sale.

Hardesty v. Graham, 13 Ky. Opin. 829.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(A) APPOINTMENT, QUALIFICATION, AND TENURE OF TRUSTEE.

§ 118. Office of trustee.

An assignee in bankruptcy is not like an ordinary assignee who takes such rights as his assignor had, but he also represents the creditors of the

bankrupt and is entitled to enforce all their equities.

Sander's Assignee v. Duvall, 8 Ky. Opin. 642.

(B) ASSIGNMENT, AND TITLE, RIGHTS, AND REMEDIES OF TRUSTEE IN GENERAL.

§ 137. Property and rights vesting in trustee.

§ 138.—Personal property in general.

Where one assigns portions of a claim to several persons named long before he is adjudged a bankrupt he can have no beneficial interest in such claims, and no interest passed to his assignee in bankruptcy.

Bendles & Bollinger v. Pierce, 9 Ky. Opin. 762.

If an assignee undertakes to run a business in his own name without disclosing the fact that he was operating as assignee, and the parties selling him goods had no notice or knowledge of his being assignee, but made sales to him upon his individual credit, such assignee is personally liable to pay for such goods.

Gosset & Bourne v. Dudley, 9 Ky. Opin. 705.

§ 143.—Property capable of transfer or subject to process.

Where an execution had been levied upon the land to satisfy a debt existing prior to the passage of the homestead law, a proceeding in bankruptcy after such levy will not stay the proceedings under the execution, since in such a case the sheriff should make the sale under the levy.

Hunter v. Porch & Cook's Assignee, 12 Ky. Opin. 12.

(C) PREFERENCES AND TRANSFERS BY BANKRUPT, AND ATTACHMENTS AND OTHER LIENS.

§ 158. Preferences voidable.

§ 160.—Insolvency of debtor.

Before a transfer of property may be held void according to the bankruptcy law of the United States, and authorize the assignee to recover the value of property transferred before the bankruptcy proceedings were begun, from the person receiving it, it must

be shown that the debtor making the transfer was insolvent, that the transfer was made to give preference to the creditor, and that the person receiving the property had, at the time, reasonable cause to believe the person making the transfer to be insolvent, and must also know that such transfer was in fraud of the bankrupt act and the transfer must be made within four months before the filing of the petition by the bankrupt.

Andreas' Assignee v. Rust, 11 Ky. Opin. 478.

(D) ADMINISTRATION OF ESTATE.

§ 246. Authority of trustee in general.

An assignee of a debt in bankruptcy holds same for the benefit of all the creditors of the bankrupt.

Given Watts & Co. v. Jerome Watson & Co., 5 Ky. Opin. 361.

§ 249. Custody, use and care of property.

An assignee in bankruptcy can not make himself a party to a proceeding to foreclose a mortgage executed by the bankrupt, after judgment of foreclosure has been rendered.

Mosby, Assignee v. Howell, 4 Ky. Opin. 554.

§ 256. Sale of property.

§ 262.—Manner and terms.

Where one has a claim secured by mortgage against property of a bankrupt, he may prove his claim in the bankrupt court, and have the property sold in such manner as that court may direct.

Andrew's Admr. v. Dudley, 9 Ky. Opin. 279.

§ 266.—Payment or recovery of purchase-money.

One holding a claim against a bankrupt can not purchase property at the trustee's sale and credit the amount of the purchase on his claim.

Andrew's Admr. v. Dudley, 9 Ky. Opin. 279.

(E) ACTIONS BY OR AGAINST TRUSTEE.

§ 291. Jurisdiction.

§ 295.—State courts.

The circuit court has no jurisdiction

over the trustee in bankruptcy; and where the trustee does not choose to assert his right in the state court he may have the action dismissed as to him.

Conn v. Anderson, 8 Ky. Opin. 223.

A creditor has the right to sue a debtor in the circuit court, notwithstanding the pendency of proceedings in bankruptcy against him, but it is the duty of the court to refuse to proceed to judgment until such proceeding shall terminate.

Conn v. Anderson, 8 Ky. Opin. 223.

(F) CLAIMS AGAINST AND DISTRIBUTION OF ESTATE.

§ 307. Creditors entitled to prove claims.

§ 308.—In general.

To hold an assignor liable, a party must allege and prove that he prepared and presented his claim in bankruptcy at least within a reasonable time after the note became due, on the first opportunity he legally had after receiving actual notice of the bankruptcy.

Orme v. David, 11 Ky. Opin. 443.

§ 312.—Estoppel or forfeiture of right.

Persons who have proved their claims against a bankrupt in the bankrupt court, thereby waived their right to maintain an action therefor in the state court.

Buckner & Co. v. Wilkerson, 7 Ky. Opin. 567.

§ 313. Claims provable.

§ 314.—In general.

A mere liability on a bond of a cashier does not make his claim provable in bankruptcy.

Cardwell v. Kemple, 11 Ky. Opin. 480.

§ 329. Proof of claims.

Where a creditor of an insolvent presented and proved his claim in a bankruptcy proceeding, he thereby exonerated the debtor from further liability therefor, and can not thereafter sue to subject property conveyed by the debtor and in the hands of the purchaser.

Bank of Kentucky v. Emmerson, 6 Ky. Opin. 665.

§ 53. Rights and liabilities as to bank and stockholders.

§ 54.—Nature and extent.

§ 55.—Actions and proceedings to enforce.

§ 56. Liability for debts and acts of bank.

§ 57.—Nature and extent.

III. FUNCTIONS AND DEALINGS.

(B) REPRESENTATION OF BANK BY OFFICERS AND AGENTS.

§ 116. Notice to officer or agent.

§ 128. Title to and disposition of deposits.

(C) DEPOSITS.

§ 137. Payment of checks.

§ 152. Certificates of deposit.

(E) LOANS AND DISCOUNTS.

§ 184. Renewal of loan or of paper discounted.

(F) EXCHANGE, MONEY, SECURITIES AND INVESTMENTS.

§ 189. Issue and payment of drafts.

(H) ACTIONS.

§ 226. Pleading.

Estoppel of bank, see Estoppel, § 63.
Jurisdiction of offense of passing counterfeit notes on national bank, see Counterfeiting, § 14.

Liability of cashier for dishonesty of teller, see Evidence, § 515.

Payment by check, see Payment, § 20.

Taxation of bank property, see Taxation, § 118.

Taxation of national banks, see Taxation, § 126.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

(A) INCORPORATION, ORGANIZATION, AND INCIDENTS OR EXISTENCE.

§ 26. General Laws.

The provisions of the Act of February 17, 1858, entitled, "An Act amending the charters of the several banks of Kentucky," do not apply to banks incorporated subsequent to the taking effect of such act, since charters not in existence could not be amended.

Commonwealth v. Falls City Tobacco Bank, 6 Ky. Opin. 683.

§ 42. Lien of bank on stock or dividends.

Since the priority of the claims of

a bank upon bank stock held and owned by debtors is given by the law, the bank can not be compelled to share with the general creditors in the general fund, until the latter are made equal.

German Security Bank v. Jefferson, 7 Ky. Opin. 736.

Where a bank was negligent in permitting its books to be so kept as to conceal from the world the true state of its cashier's relations to it, a court of equity will not so apply the rules of equity as to protect the bank in its rights as to unpaid stock pledged by its cashier to plaintiff, where examination by plaintiff as to the status of the relation between the cashier and the bank would not have revealed such relation.

National Bank of Lebanon v. Louisville Ins., etc., Co., 7 Ky. Opin. 476.

(D) OFFICERS AND AGENTS.

§ 53. Rights and liabilities as to bank and stockholders.

If a bank has been robbed without collusion of its cashier, and the robbery was not rendered possible by the cashier's negligence or incompetency, the cashier and his bondsmen are excused from liability for loss by the robbery.

Lorretto Benevolence Assn. v. Pope, 7 Ky. Opin. 681.

It was held negligence for the cashier of a bank to open the vaults to count the cash on hand, thereby exposing a large amount of money when no other person was present, resulting in the bank being robbed, and the cashier and his bondsmen are liable for loss by the robbery under such circumstances.

Lorretto Benevolence Assn. v. Pope, 7 Ky. Opin. 681.

§ 54.—Nature and extent.

The director of a bank is only in a limited sense a trustee for the bank, its stockholders and those dealing with it, and where he has a claim of his own against the bank he is under no obligation to postpone his claim to that of the bank and is as much en-

titled to the reward of diligence as any other creditor.

Northern Bank of Kentucky v. Bell, 11 Ky. Opin. 346.

The diligence required of a bank cashier is such only as a skilled and prudent cashier ordinarily bestows on the affairs of the bank, and such care must be the test by which his liability is to be determined; and where he is not guilty of negligence he is not liable to the bank for loss sustained by it by reason of the teller in such bank having abstracted money from the bank.

Pepper v. Planters' Nat. Bank of Louisville, 12 Ky. Opin. 219.

§ 55.—Actions and proceedings to enforce.

Where a bank cashier and his bondsmen defend an action on the bond on the ground that the bank was robbed of the money for which they are sued, the burden is on them to establish the robbery, and that it was not the result of negligence on the part of the cashier.

Lorretto Benevolence Assn. v. Pope, 7 Ky. Opin. 681.

Where, in an action on the bond of a bank cashier for money of the bank unaccounted for the defense is robbery of the bank, the burden is on the bondsmen to show not only the robbery, but to establish the fact that at the time of its commission the cashier was discharging the duties of his office with skill, prudence and fidelity.

Lorretto Benevolence Assn. v. Pope, 7 Ky. Opin. 681.

Where the affairs of a bank are being wound up and the bank has a claim against the cashier and his bondsmen which the directors fail to sue for, the stockholders may institute proceedings therefor.

Lorretto Benevolence Assn. v. Pope, 7 Ky. Opin. 681.

§ 56. Liability for debts and acts of bank.

§ 57.—Nature and extent.

Where one officer of the bank has control of the bank's assets and is entrusted by his partners with au-

thority to borrow money for the bank, and he enters in a depositor's pass-book deposits of money, the bank account becomes liable to such depositor, and he can not assert a claim personally against the officer of the bank.

McBrayer, Trapwall & Co.'s Trustee v. Haggin, 12 Ky. Opin. 498.

Where one makes deposits at a bank, dealing with the cashier, and the cashier makes investments with the money thus deposited, and the bank presents settlement sheets with the depositor, the dealing is with the bank and not with the individual cashier, and the bank, having received the deposits, must account for them and cannot say that the action of its cashier was ultra vires and that it is not liable on account of the investments, since the bank by its officers must be presumed to have known and approved the action of its cashier and is bound by them.

Robb v. Savings Bank of Louisville, 12 Ky. Opin. 713.

III. FUNCTIONS AND DEALINGS.

(B) REPRESENTATION OF BANK BY OFFICERS AND AGENTS.

§ 116. Notice to officer or agent.

A notice to an assistant cashier of a bank of a defense to a note given before the bank discounts the note is not notice to the bank, where it is shown that neither the president nor cashier had any such notice, and where it is shown that the assistant cashier had no voice in discounting paper, and had not been intrusted with or permitted to discharge any such duty by the bank.

Mehler & Estenkemper v. Ferguson, 10 Ky. Opin. 178.

§ 128. Title to and disposition of deposits.

According to commercial and banking usages the last indorser has the right to check for proceeds of a bill of exchange.

O'Bannon v. Roper, 1 Ky. Opin. 350.

(C) DEPOSITS.**§ 137. Payment of checks.**

The appellant waived his right of action against the bank by taking up the check and assenting to the charge for the payment against him, as shown by his permitting his account with the bank, including the charge, to be balanced on his passbook without objection, and especially so as he acquiesced in the transaction for three years.

Northern Bank of Kentucky v. Scott, 5 Ky. Opin. 450.

§ 152. Certificates of deposit.

The phrase "in current funds," used in a draft or certificate of deposit means lawful money in current circulation.

Colescott v. Galt & Co., 3 Ky. Opin. 523.

(E) LOANS AND DISCOUNTS.**§ 184. Renewal of loan or of paper discounted.**

Where the owner of a note discounts it at a bank, and renewals were executed to the bank, it sufficiently shows that the original owners have parted with their ownership, and that such note or its renewals belong to the bank, and the bank could not be divested of ownership until it is paid the amount of the note.

Betz & Co. v. Altemeyer, 10 Ky. Opin. 679.

(F) EXCHANGE, MONEY, SECURITIES AND INVESTMENTS.**§ 189. Issue and payment of drafts.**

Where a discounting bank requests an endorsement of other than the payee of a draft, and such endorsement is given, the payment of the amount to the payee is a sufficient consideration to hold the other endorser liable.

Colescott v. Galt & Co., 3 Ky. Opin. 523.

(H) ACTIONS.**§ 226. Pleading.**

Where nothing appears showing

that the maker of a note or the acceptor of a bill has been discharged as to the note or bill, or that either has become insolvent, a petition against a bank for negligence in failing to take steps to bind the endorser fails to state a cause of action against the bank, because it is not shown that plaintiff has suffered any loss.

Talbott v. Bank of Kentucky, 8 Ky. Opin. 480.

BAR.

See Judgment, §§ 540, 562.

Judgment as bar to another action, see Judgment, §§ 540, 564.

Of action, see Limitation of Actions, §§ 165, 171.

Of right of action, see Accord and Satisfaction, § 8.

BASTARDS.

Breach of recognizance bond, see Recognizances, § 5.

III. PROCEEDINGS UNDER BASTARDY LAWS.**§ 47. Security for appearance.**

Where a bond for the appearance of a defendant is not conditioned that he would perform the judgment of the court, the bondsmen are only held to the stipulations of the bond, and can not be held liable on such bond because of the failure of the defendant to perform the judgment of the court.

Commonwealth v. Page, 9 Ky. Opin. 437.

The discharge of a defendant from imprisonment on a bastardy charge because of his insolvency does not affect the liability of his surety on a bond.

Austin v. Commonwealth, 9 Ky. Opin. 605.

A person accused of bastardy, when arrested and brought before the court, is required to give bond for his appearance in the county court of the county in which the warrant issued, on the first day of the next term thereof, and to perform the

judgment of such court; but when a bond fails to bind the security for the principal's performance of the judgment of the court, it only requires the security to surrender his principal in execution of any judgment rendered against him, and by doing so the security is discharged from all liability.

Commonwealth v. Murrell, 9 Ky. Opin. 651.

Where a bond is taken in a bastardy case conditioned for the appearance of the defendant and to perform such judgment as the court might render, an appearance of such defendant satisfies the covenants of the bond.

Commonwealth v. West, 12 Ky. Opin. 132.

BELIEF.

Statements on information and belief, see Pleading, §§ 48, 68.

BENEFICIAL ASSOCIATIONS

§ 6. Membership.

§ 10.—Forfeiture of membership, and expulsion or suspension of members.

§ 18. Benefits.

§ 6. Membership.

§ 10.—Forfeiture of membership, and expulsion or suspension of members.

Where a member of the Ancient Order of United Workmen is suspended in accordance with the usages and customs of the order for failure to pay his dues, and after notice fails to contribute to discharge the benefits resulting to others, neither he nor those claiming under him have any right to complain.

Stetson v. Ancient Order of United Workmen, 10 Ky. Opin. 176.

§ 18. Benefits.

Where, under the rules of an association of which decedent was a member, it was provided that at the death of a member his wife or mother would be entitled to certain named benefits, it is held where the wife died prior to her husband, but decedent's

stepmother survived him, that such stepmother is not entitled to such benefits.

Smith's Admr. v. Louisville Benevolent & Relief Assn., 8 Ky. Opin. 152.

BIDS.

At judicial sale, see Judicial Sales, § 18.

Failure to comply with, see Execution, § 235; Judicial Sales, §§ 24, 26.

BIGAMY.

§ 1. Nature and elements of offense.

It is the second marriage of one, who at the time has a husband or wife living from whom he or she has not been divorced, that constitutes bigamy; and where a man having a wife in this state elopes to Indiana with another woman and there marries her, he can not be punished in this state, for the offense is committed in Indiana, where the second marriage occurs.

Commonwealth v. Ferrell, 11 Ky. Opin. 566.

BILL OF EXCHANGE.

See Bills and Notes.

What constitutes, see Bills and Notes, § 1.

BILL OF PARTICULARS.

See Pleading IX.

BILL OF SALE.

Construction of, see Sales, § 149.

Lien retained in, see Sales IV, B.

Not required to be recorded, see Sales, § 148.

BILLS AND NOTES.

I. REQUISITES AND VALIDITY.

(A) FORM AND CONTENTS OF BILLS OF EXCHANGE, DRAFTS, CHECKS AND ORDERS.

§ 1. Nature and essentials in general.

§ 2. What law governs.

(B) FORM AND CONTENTS OF PROMISSORY NOTES AND DUE BILLS.

- § 31. Necessity of words of negotiability.
- § 32. Designation of parties.
- § 47. Memoranda and collateral agreements affecting character of instrument.

(C) EXECUTION AND DELIVERY.

- § 54. Signature.
- § 56. Affixing revenue stamps.
- § 58. Partial execution and failure of others to sign.
- § 60. Execution in blank.
- § 62. Delivery.

(D) ACCEPTANCE.

- § 66. Necessity.
- § 73. Nature of contract and liability of acceptor.
- § 84. Promise to accept.
- § 86.—Construction and operation in general.

(E) CONSIDERATION.

- § 90. Necessity.
- § 91. Sufficiency.
- § 92.—In general.
- § 95.—Exchange of paper.
- § 96. Accommodation paper.
- § 97. Failure of consideration.
- § 98. Estoppel to deny consideration or allege failure of consideration.

(F) VALIDITY.

- § 100. Validity of assent.
- § 106. Legality of object or of consideration.
- § 108. Legality of particular provisions.
- § 110.—As to attorneys' fees and costs.

II. CONSTRUCTION AND OPERATION.

- § 113. Estoppel or waiver of defect or objection.
- § 116. General rules of construction.
- § 118. Parties.
- § 120.—Joint or several.
- § 125. Interest.
- § 129. Time of maturity.

III. MODIFICATION, RENEWAL AND RESCISSION.

- § 138. Renewal and agreements to renew.

- § 140. Operation and effect of extension or record.

- § 141. Renewal bills and notes.

IV. NEGOTIABILITY AND TRANSFER.

(A) INSTRUMENTS NEGOTIABLE.

- § 148. Nature and form of instruments.
- § 150.—Promissory notes.

(C) TRANSFER WITHOUT INDORSEMENT.

- § 208. Transfer by delivery.
- § 209.—In general.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(A) INDORSEMENT BEFORE DELIVERY TO OR TRANSFER BY PAYEE.

- § 223. Nature and construction of contract in general.
- § 236. Accommodation indorsement.
- § 237.—In general.
- § 247. Time of indorsement.
- § 248. Mode or form of indorsement.
- § 256. Discharge of indorser.

(B) INDORSEMENT FOR TRANSFER.

- § 280. Nature of liability on indorsement in general.
- § 284.—As guarantor.
- § 286. Mode, form or purpose of indorsement.
- § 293.—Indorsement without recourse.
- § 299. Necessity, to charge indorser, of proceedings against maker.
- § 300. Extent of liability.
- § 301. Discharge of indorser.

(C) ASSIGNMENT OR SALE.

- § 310. Nature and construction of contract in general.
- § 313. Rights of assignee or purchaser.
- § 314. Equities and defenses against assignee.
- § 320.—Set-offs existing before transfer or notice.
- § 321.—Set-offs arising after transfer or notice.

(D) BONA FIDE PURCHASERS.

- § 327. Nature and grounds of protection.

- § 331. Actual notice.
- § 332.—In general.
- § 363. Titles and rights acquired by bona fide purchasers.
- § 364. Defenses as against bona fide purchasers.
- § 365.—In general.

VI. PRESENTMENT, DEMAND, NOTICE, AND PROTEST.

- § 385. Nature and grounds of requirement of diligence of holder.
- § 388. Presentment for acceptance.
- § 389.—Necessity.
- § 391.—Sufficiency.
- § 408. Protest and certificate thereof.
- § 409.—Requisites and sufficiency.
- § 411. Sufficiency of notice of non-payment and of protest.
- § 412.—Notice by mail.
- § 415.—Place.

VII. PAYMENT AND DISCHARGE.

- § 425. Nature and modes of discharge in general.
- § 428. Mode and sufficiency of payment.
- § 430.—New bills or notes.
- § 433. Indorsement of payments.
- § 436. Discharge.
- § 439.—Payment or satisfaction by other parties.
- § 440. Rights of parties on payment or discharge.

VIII. ACTIONS.

- § 441. Right of action.
- § 445.—Time of accrual.
- § 450. Defenses.
- § 451.—In general.
- § 452.—Particular grounds.
- § 455. Parties plaintiff.
- § 458. Parties defendant.
- § 461. Declaration, complaint or petition.
- § 462.—Form and requisites in general.
- § 466.—Nature of contract.
- § 472. Plea, answer, or affidavit of defense.
- § 473.—Form and requisites in general.
- § 474.—Traverses or denials and admissions in general.
- § 475.—Execution and delivery of instrument.

- § 477.—Mistake, fraud, or duress.
- § 484.—Payment and discharge.
- § 486. Replication or reply and subsequent pleadings.
- § 488. Setting out, annexing, filing or production of instrument, and profert and oyer.
- § 490. Presumptions and burden of proof.
- § 499.—Payment.
- § 500. Admissibility of evidence.
- § 515. Weight and sufficiency of evidence.
- § 524.—Possession as evidence of ownership.
- § 528. Amount of recovery.
- § 540. Judgment.
- § 542. Appeal.

See Evidence, § 402.

Alteration of negotiable instrument, see Alteration of Instruments, § 20.
Assignment of note, see Assignments, § 20.

Consideration of note executed by directors of corporation, see Corporations, § 463.

Corporate notes and bills, see Corporations, §§ 463, 465.

Estoppel of maker of note as against assignee, see Estoppel, § 94.

Estoppel of payer of note, see Estoppel, § 86.

Executed by corporation, see Corporations, § 463.

Executed by married women, see Husband and Wife, § 85.

Executed by officers of corporation—Individual liability, see Corporations, § 463.

Execution and delivery of note on Sunday, see Sunday, § 13.

Executing notes for accounts, see Account, § 1.

Fraudulent inducement to execute notes, see Fraud, § 58.

Gift of negotiable instrument, see Gifts, § 31.

Gift of promissory note or bill, see Gifts, § 67.

Indorsement by trustee, see Trusts, § 213.

Married women's liability on notes, see Husband and Wife, § 85.

Note executed to executors held in trust, see Trusts, § 213.

Payment by note, see Payment, § 15.
Usurious note, see Usury, § 21.

I. REQUISITES AND VALIDITY.**(A) FORM AND CONTENTS OF
BILLS OF EXCHANGE, DRAFTS,
CHECKS AND ORDERS.****§ 1. Nature and essentials in general.**

A copy of an order of the county court making an allowance of a certain sum, made by the clerk of the court, is not a bill of exchange or negotiable paper, but is a mere direction to the sheriff to pay a certain sum out of a particular fund when collected.

Ogden v. Cochran & Co., 6 Ky. Opin. 362.

§ 2. What law governs.

Where a note is made in Ohio its legal effect must be determined by the law of that state.

Ehrman v. Stoll, 10 Ky. Opin. 592.

**(B) FORM AND CONTENTS OF
PROMISSORY NOTES AND
DUE BILLS.****§ 31. Necessity of words of negotiability.**

Where the statute provides that notes "made payable to any person or order, or to any person or bearer, or to any person or assigns, shall be negotiable by indorsement thereon," a note made payable to the order of a named person is the same as if it had been payable to him or order, and is negotiable.

Ehrman v. Stoll, 10 Ky. Opin. 592.

§ 32. Designation of parties.

A note made payable to a party's own order imports no legal obligation and can only be used as evidence of an indebtedness not as a foundation of an action.

Bryant's Admr. v. Worthington, 1 Ky. Opin. 378.

§ 47. Memoranda and collateral agreements affecting character of instrument.

A memorandum attached to a note after the date of its execution promising to pay an additional rate of interest for the time that had elapsed since its execution, is no part of the contract embraced in the note and is

without consideration and unenforceable.

Showalter v. Kirk's Exrs., 11 Ky. Opin. 741.

Where one conveys land to his son, taking a note for the purchase-money to become due several years thereafter, and about one and a half years thereafter by agreement between the father and son the father wrote across the back of such note that "This note is not to be paid in my lifetime but to bear six per cent. interest in the place of ten per cent. This 30th of December, 1868," and signed the same, the indorsement creates a new contract and is a part of the note and the original transaction.

Garvey v. Garvey, 11 Ky. Opin. 910.

(C) EXECUTION AND DELIVERY.**§ 54. Signature.**

Under Gen. Stat., Ch. 22, § 20, if a defendant did not sign the note in suit, he is not bound, although his name may have been signed by his son upon verbal authority to do so.

Powers v. Dunn, 10 Ky. Opin. 493.

Where an issue is raised as to whether a defendant signed a note, the signature of such defendant to his answer and other pleadings or papers in the case are competent evidence to go to the jury as evidence by comparison that his signature to the note was in his own handwriting.

Powers v. Dunn, 10 Ky. Opin. 493.

§ 56. Affixing revenue stamps.

The fact that a bill of exchange had not been stamped according to the act of Congress does not operate to render it invalid.

Davis' Exrs. v. Hane, 1 Ky. Opin. 487.

§ 58. Partial execution and failure of others to sign.

Though a note be delivered, with the understanding that another is to sign it, it is obligatory on those signing, if the additional surety be not secured, and where such additional surety is not secured, an action for damages against the ones signing will

lie for failure to thus secure additional names.

Cox v. Holloway & Burton, 3 Ky. Opin. 201.

§ 60. Execution in blank.

A plea of non est factum to a note, the blanks of which had been filled in by the agent of the payors, can only be sustained when the person so acting was a special agent so far as the particular note was concerned, and that his authority was limited to fill in a particular name.

Leiber v. Beck, 4 Ky. Opin. 408.

An agent can bind his principal on a note by filling in blanks, after the note had been sent him, though the name filled in was not the person to whom the principal intended the note made payable.

Leiber v. Beck, 4 Ky. Opin. 408.

§ 62. Delivery.

A note signed on Sunday is not invalid for that reason, and where it is signed on Sunday and delivered on the Wednesday following, it can not be avoided on the ground of having been signed on Sunday, since it is the delivery and acceptance that completed its execution.

Mitchell v. Shucks' Exrs., 9 Ky. Opin. 448.

(D) ACCEPTANCE.

§ 66. Necessity.

Unless one accepts an order drawn upon him, no recovery can be had from him thereon; and one who has not consented to do so can not be compelled in an ordinary action to pay his debt to a third person, unless the whole of the debt is assigned.

Cottrell v. Decker, 9 Ky. Opin. 737.

§ 73. Nature of contract and liability of acceptor.

The acceptance of an order from the obligor on a note, by the creditor, payable on a third party at a future time, does not operate as a stay of proceedings on the note against the obligor and sureties, nor does it compel the creditor to delay proceedings until such time as default on the order be made; it being merely an ac-

ceptance as collateral security for the debt.

Fagan v. Elam, 2 Ky. Opin. 365.

§ 84. Promise to accept.

§ 86.—Construction and operation in general.

An order for money, when accepted by the drawee, discharges the debt of the drawer, and the payee must, after due diligence, show that he has failed to collect from the person on whom he holds the order before he can hold the drawer liable.

May v. May, 9 Ky. Opin. 848.

(E) CONSIDERATION.

§ 90. Necessity.

Where a son has forged a note, and the holder of the note seeks to have him arrested for the crime, and the mother, to prevent his arrest, executes a note for the amount of the forged note, such note is destitute of any valuable consideration and has none of the elements of a binding contract, and will not be enforced.

Miller v. Payne, 13 Ky. Opin. 656.

§ 91. Sufficiency.

§ 92.—In general.

The mere agreement to abandon one remedy and pursue another, or to abandon for the time being the attempt to collect a debt without any other consideration, is not sufficient to hold the promisor liable.

Jackson v. Offutt, 9 Ky. Opin. 916.

A benefit to one party and some prejudice to the other is sufficient consideration to sustain a note.

Buckner v. Edwards, 6 Ky. Opin. 112.

Where appellants paid a note of another against whom suit had been threatened, upon his promise to renew with appellants as sureties, there was a binding consideration, in a suit to recover from the payee.

Murphy & McCallister v. Hughes' Admr., 2 Ky. Opin. 667.

A note given for the purpose of securing the discharge of one from the army is held to constitute a valid consideration, as to counsel in assist-

ing a man to obtain his discharge in a legal manner, and is neither illegal nor against public policy.

Hammond v. Sanford, 2 Ky. Opin. 547.

A compromise with the legatees, to avoid threatened litigation over the will of the testator, is held to be a good and binding consideration in a note given in full settlement with the devisees, when free from fraud and over-reaching.

Swearingen v. McDee, 3 Ky. Opin. 86.

Where a note is executed upon the express consideration that the payee is to procure for the promisor a credit on a judgment against him, and no such credit is procured, there is a failure of consideration and such note is not enforceable.

McKinney & Bro. v. Gardner's Admr., 9 Ky. Opin. 238.

The surrender of a valid note to the maker is a sufficient consideration for the execution of a new note.

Mitchell v. Shucks' Exrs., 9 Ky. Opin. 448.

Where the only consideration, the agreement of the creditor not to coerce the payment of a debt by legal proceedings, is upon the parol promise of a third party that he would pay it, it is insufficient, since such a promise is within the statute of frauds and not binding.

Jackson v. Offutt, 9 Ky. Opin. 916.

A note signed as and for additional security, or to indemnify securities on another note which is newer, delivered to the persons to whom it was to be given, is without consideration in the other's hands, and on demand of those signing it should be surrendered to them.

Burbank's Admr. v. Hall, 9 Ky. Opin. 937.

Where the owner of a note against a father agrees not to sue for a reasonable time if a son will sign the note as co-obligor with his father, the giving of time to the father is a sufficient consideration for the son's becoming obligated, and he is bound

whether the father knew his son had signed the note or not.

Hieatt v. Hieatt, 10 Ky. Opin. 101.

Where a debtor seeking to be discharged in bankruptcy is met by a creditor, who resists such discharge, and the debtor gives to his creditor a note for the amount of his claim, in consideration that he will cease to resist such discharge, such note is without consideration and is not collectible, since the consideration of the execution of the note is against public policy, and is immoral and void.

Renfroe v. Boles, 10 Ky. Opin. 204.

Where a sister, at the instance of her brother, left her home and went with him to another state, and while there performed valuable services for him, such services constitute a sufficient consideration to uphold a note executed to such sister by the brother.

Dixon v. Posey, 10 Ky. Opin. 211.

A note executed in consideration that the payee will induce the redelivery of a horse won at a game of cards is not valid, since there is no consideration to base it upon, and such a note is unenforceable even in the hands of an innocent holder.

Petty v. Fuqua, 10 Ky. Opin. 274.

The sale of the use of a patent right in a certain territory is a good consideration for the execution of a note, and if the title to the right is defective at the time of the sale and is afterwards perfected the right inures to the benefit of the purchaser.

Dawson v. Babcock & Nille, Assignees, 11 Ky. Opin. 248.

The conveyance of land by a tenant by the curtesy is a good consideration for a note, and in the absence of fraud or mistake the conveyance can not be disturbed nor cancelled.

Jenkins v. Netherland, 11 Ky. Opin. 432.

§ 95.—Exchange of paper.

Where a note originally given for the purchase of moonshine whisky is afterwards partly paid and then assigned, and the assignee, who is an innocent purchaser, agrees in compro-

mise to take a new note properly secured for a less sum than the face value and the old note is surrendered and the new secured note is made payable to assignee's wife, the compromise and new agreement constitute a new consideration sufficient to support the promise, and said note is valid.

Beall v. Bethel, 11 Ky. Opin. 343.

The delivery of one note in consideration for another is binding and may be pleaded, although not assigned.

National Bank of Stanford v. Hocker, 11 Ky. Opin. 416.

§ 96. Accommodation paper.

Where a corporation owes a debt, and third persons, without any consideration, moving from the debtor or even a request from it, execute their note to the creditor for the debt, it is neither payment, novation, nor accord and satisfaction.

Hart v. Trustees of Princeton College, 10 Ky. Opin. 233.

§ 97. Failure of consideration.

Where a note was given for a promised loan of money which was never realized, there is a failure of consideration.

Greer v. Gardner, 7 Ky. Opin. 172.

A note, given for the purchase of an article, adulterated in violation of a penal statute, is voidable and without consideration, in the hands of the obligee or his assignee without the privity of the obligor, and for a new consideration on which the assignee accepted it.

Walker v. Smith, 4 Ky. Opin. 323.

If the note in suit was not given in consideration of the sale note on T., but only for a promised loan of the money expected to be paid by T., which was never made, there was a failure of consideration; although the defendant may have incurred a liability by laches in not collecting the note on T., but such negligence did not render the note of defendant obligatory if the anticipated consideration failed.

Gardner v. Greer, 5 Ky. Opin. 478.

A note given for purchase-money of land is given without consideration,

when the seller has no title or interest in the land.

Davis v. Davis' Admr., 12 Ky. Opin. 550.

§ 98. Estoppel to deny consideration or allege failure of consideration.

Where one who executed a note to enable a third person to obtain money or property with it, and such object is accomplished by the third person, the maker can not be allowed to plead want of consideration for its execution, nor set off against it debts due him from such third person.

Heck v. Northwestern Mfg. Co., 7 Ky. Opin. 143.

The acceptance of an article for which a note is given, without objection, and long possession of same, is a waiver of a defense against the note as to the consideration, except for illegality.

Walker v. Smith, 4 Ky. Opin. 323.

Where a new note is taken, in consideration of the surrender of another debt, the assignee is estopped from impeaching the legality of the original consideration.

Walker v. Smith, 4 Ky. Opin. 323.

(F) VALIDITY.

§ 100. Validity of assent.

Where, after the death of a wife, the family physician discovered that the husband's mind was weakening from disease of the brain, resulting in almost entire loss of memory, that his former affection for his children no longer existed, that his grandchildren residing in his own home were neglected, and he declared that his children should not enjoy any part of his estate, and while in such condition he executed a note for a large sum, amounting to about half of his estate, and thereupon confessed judgment on the note, it was held that at the time of confession of judgment on the note he was not in a condition of mind to understand and comprehend what he was doing, and that hidden influences operated for the purpose of intensifying his hatred toward his grandchild-

dren which resulted in the execution of the note.

McNees v. Thompson, 5 Ky. Opin. 121.

§ 106. Legality of object or of consideration.

A note given to secure a payment for property taken as a bribe to prevent prosecution of one of the obligors, is illegal and without consideration; but notwithstanding a previous intention or threat to institute such a prosecution if the note was given for the value of the property taken, and to compromise the plaintiff's claim to damages for trespass, the consideration is legal.

Greathouse v. Wright, 3 Ky. Opin. 325.

Although the illegality of an original consideration might constitute a bar to an action on a note, yet where judgment is permitted thereon, a new obligation is created by replevying it.

Myers v. Stephens, Admr., 3 Ky. Opin. 75.

To defeat the consideration in a note, for money borrowed to be used to corrupt an election, the illegal purpose must have been known to the lender, and he must have participated in that intent, and the accomplishment of the illegal act must have entered into the contract, forming the motive, and inducement in the mind of the lender, to loan the money.

Lockridge v. Clark, 4 Ky. Opin. 501.

Where any portion of the consideration of a note was intoxicating liquors sold and delivered at the tavern house of one not licensed to sell liquors, such note is void, as the consideration of such note is illegal.

Gill v. King, 9 Ky. Opin. 873.

§ 108. Legality of particular provisions.

§ 110.—As to attorneys' fees and costs.

A stipulation in a promissory note that if it should become necessary to collect it by legal proceedings the obligors would pay a reasonable attorney's fee and costs of collection, is not enforceable.

Trimble v. Farmers' Bank of Kentucky, 8 Ky. Opin. 186.

Conditional contracts inserted in the body of promissory notes to pay attorney fees, if legal process is resorted to to collect the note, are not enforceable.

Mt. Vernon Banking Co. v. Randolph, 8 Ky. Opin. 692.

Where obligors agree that in case the holder of a bond or coupon resorts to legal proceedings for the collection thereof after the same became due, such holder shall recover reasonable attorney's fees for the collection, such obligors are liable for such fees, and the holder may collect them in addition to the principal and interest due on the bond.

Bissett, Trustee, v. Johnson, 9 Ky. Opin. 466.

II. CONSTRUCTION AND OPERATION.

§ 113. Estoppel or waiver of defect or objection.

The failure to state on the face of a note a consideration importing a lien implies either that there was no such consideration or that, if a lien existed, it was thereby waived.

Murphy v. Nelson, Admr., 1 Ky. Opin. 77.

§ 116. General rules of construction.

Where the court construes a note most favorably to the maker, the latter ought not to complain.

Rainey v. Martin, 6 Ky. Opin. 385.

Upon the execution of a note the law presumes that all previous outstanding indebtedness was settled by that transaction.

Godsey v. Godsey, 5 Ky. Opin. 627.

§ 118. Parties.

§ 120.—Joint or several.

Where a note does not purport to bind a corporation or point to its funds as the source from which it is to be paid, the use of the personal pronoun "we" rebuts the presumption arising from the subsequent descriptive words "president and directors," and imparts an individual obligation on those signing it.

Bowman v. McBrayer, Trapnell & Co., 8 Ky. Opin. 15.

§ 125. Interest.

A promise in a note to pay a debt "with eight per cent. interest" is an undertaking to pay eight per cent. interest from the date of the promise until the maturity of the note only, and from its maturity such a note only draws six per cent. interest.

Posey v. Mayer's Admr., 11 Ky. Opin. 456.

Where a purchaser of real estate gives his notes and makes payment thereon from time to time, interest should be calculated from maturity on all the notes at the rate provided in the contract up to the date of each credit and so on until all the credits are applied, and the balance due with six per cent. interest is what the creditor is entitled to recover.

Gruelle v. Garrard, 13 Ky. Opin. 944.

§ 129. Time of maturity.

A note, payable at some future time, depending on a contingency, is held not to be due until the happening thereof (though it may read on the face of same, "payable one day after date"), and the limitations would begin to run from such due date.

Miller v. Miller's Devisees, 3 Ky. Opin. 552.

III. MODIFICATION, RENEWAL AND RESCISSION.**§ 138. Renewal and agreements to renew.**

The execution and delivery of a new note, to offset one previously given, will carry all the safeguards as to a valuable consideration that the old note had, though the payee be a different person.

Miller v. Miller's Devisees, 3 Ky. Opin. 552.

§ 140. Operation and effect of extension or record.

The renewal of an obligation will not release bonds held by the creditor as collateral security for the debt, but where such renewals are by new firms and with new parties to the bills, without the knowledge and consent of the owners, it will amount to

a surrender of all claims to hold the bonds as collateral.

City Nat. Bank of Paducah v. Smith, 10 Ky. Opin. 734.

§ 141. Renewal bills and notes.

The possession of the note sued on is strong presumptive evidence that the alleged balance has not been paid, and the execution of another note after the date of the one sued on strengthens this presumption.

Kendrick v. Lee, 5 Ky. Opin. 551.

IV. NEGOTIABILITY AND TRANSFER.**(A) INSTRUMENTS NEGOTIABLE.****§ 148. Nature and form of instrument.**

A clause contained in the charter of a savings bank: "This corporation shall have the rights and privileges of the chartered savings institution of the State," does not confer upon the bank the power of buying and dealing in inland bills of exchange and promissory notes, nor place them upon the footing of foreign bills of exchange.

Sanders v. Merchants Bank, 7 Ky. Opin. 706.

§ 150.—Promissory notes.

One who purchased mortgage notes did not acquire a greater equity therein than the vendor had.

Pindell v. Brown, 6 Ky. Opin. 302.

(C) TRANSFER WITHOUT INDORSEMENT.**§ 208. Transfer by delivery.****§ 209.—In general.**

A person having the possession of a promissory note for the purpose of collection, has no authority to make a contract on behalf of the owner to surrender it to another.

Keeber v. Henderson, 8 Ky. Opin. 552.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.**(A) INDORSEMENT BEFORE DELIVERY TO OR TRANSFER BY PAYEE.****§ 223. Nature and construction of contract in general.**

The effect of indorsing a bill or note

is a conditional contract on the part of the indorser to pay in case of the acceptor's or maker's default, provided proper and prompt measures be taken to fix the liability of the indorser by making demand and giving him notice of the default.

National Bank of Monticello v. Bryant, 8 Ky. Opin. 727.

§ 236. Accommodation indorsement.

§ 237.—In general.

The indorsement of a bill of exchange by one, for the purpose of assisting the drawer to obtain credit at the discounting bank, can not be held liable on same, by the payee, especially where such facts were known to the acceptors.

Turner Wilson & Co. v. Browder & Moore, 3 Ky. Opin. 181.

Where a bill of exchange, endorsed by A, is negotiated at the bank, as between A and the bank, A is principal; and where B for the accommodation of A endorses with him a new bill of exchange as a renewal of the first one, B's liability is that of endorser for A, and if he should have to pay the bill, he might recover the whole amount from A.

Hart v. Mattingly, 8 Ky. Opin. 404.

§ 247. Time of indorsement.

In the absence of proof to the contrary, the presumption is that negotiable paper acquired in the usual course of business and for a valuable consideration, has been indorsed before it became due.

Davis' Exrs. v. Hane, 1 Ky. Opin. 487.

§ 248. Mode or form of indorsement.

Where a party writes his name across the back of a note instead of signing it at the end, it will be presumed that he intended to become bound as an indorser or grantor and not as a co-obligor, and in that case the payee has no cause of action against him until he has prosecuted the obligor to insolvency.

Beal v. Lampkins, 5 Ky. Opin. 196.

§ 256. Discharge of indorser.

An obligor in a note may be released by parol, and the fact may be estab-

lished by parol evidence, but such evidence should be clear, satisfactory and to the point, and if it does not come up to this standard it may be outweighed by the conduct and admissions of the party.

Page v. Neal & Co., 5 Ky. Opin. 419.

Where the payee of a bill subsequently inserts the name of another as drawee without his authority, the alteration will operate to discharge the indorser from liability.

Steele v. Rickett's Exr., 1 Ky. Opin. 515.

Commercial intercourse having been entirely suspended between Kentucky and the city of New Orleans, at which place the bill was payable, at maturity, the failure of the holder to present it for payment or protest at that time, did not operate to release the indorser.

Thompson v. Bell, 2 Ky. Opin. 77.

Where, notwithstanding no sufficient diligence is shown to make an assignor liable, the assignor at the time of making the assignment made an agreement with the holder of the note that he would remain bound, he is not released.

Hiatt v. Field, 8 Ky. Opin. 740.

(B) INDORSEMENT FOR TRANSFER.

§ 280. Nature of liability on indorsement in general.

Where the payee of a note was the first to indorse it, subsequent indorsement by another did not make him a guarantor of the drawer and the payee; it operated only to bind him with the first indorser and the obligors to the holders of the note; but as between the first and second indorser, the effect was to bid the latter as surety for the former.

Woodsmall v. Meyer, 7 Ky. Opin. 286.

As a matter of law, nothing else appearing than a bill of exchange, there would be no implied assumption by the drawers to the acceptors who may have paid same.

Wilson & Co. v. Browder & Moore, 3 Ky. Opin. 181.

With the evidence equipoised, the fact that H is the payee and his name is just where it would be on the bill as first indorser, becomes important and must assert an influence in determining the liability of the parties.

Jones v. Jones, 5 Ky. Opin. 549.

Where a holder of a note obtains judgment against the principal and delays nearly a month before issuing execution, unaccounted for, will release one who has assigned the note to the plaintiff.

Brent v. Sinville, 8 Ky. Opin. 781.

Where a note is made payable to A, who assigns it to B, the assignor is bound to B, as an assignor, and before B can look to A, it is incumbent on him to show that he had sued and prosecuted the maker of the note to insolvency, with legal diligence.

Morgan & Berry v. McGregor, 9 Ky. Opin. 703.

Where a person is in the habit of discounting his corporation's notes at a bank and takes a note to the bank for such purpose, but by mistake and oversight fails to indorse the note, which he discounts, the mistake may be corrected in a suit on the note and the corporation held liable as an indorser.

Star Planing Mill Co. v. Exchange Bank of Kentucky, 11 Ky. Opin. 277.

§ 284.—As guarantor.

Where a note is made payable to A, who assigns it to B, upon the face of the transaction, A is bound to B as an assignor and not otherwise, and where B seeks to hold A as guarantor he must plead and prove facts showing that his contract was that of a guarantor.

Morgan & Berry v. McGregor, 9 Ky. Opin. 703.

§ 286. Mode, form, or purpose of indorsement.

When a note is handed over to a bank cashier for a valuable consideration, the indorsement is a mere form, the transfer for consideration being the substance; and it creates an equitable right and entitles the party to call for the form, and under proper

issues in a case the transferrer of the bill may be compelled by bill in equity to indorse.

Star Planing Mill Co. v. Exchange Bank of Kentucky, 11 Ky. Opin. 277.

§ 293.—Indorsement without recourse.

The presumption of law is that a party trading for an obligation on a third party, without recourse, agrees to look to him alone, but that he does not part with the consideration paid for the assignment without having a binding obligation on some one; therefore, the assignment without recourse must be presumed to warrant that it is a legal binding obligation on the obligor, but that he does not undertake to refund the consideration should the obligor prove insolvent.

Howard v. Adams, 1 Ky. Opin. 279.

§ 299. Necessity, to charge indorser, of proceeding against maker.

Notwithstanding the insolvency of the maker of a note, it is still necessary for a plaintiff seeking to hold an indorser to show that he has used due diligence to collect the debt of him, for although insolvent he may not be without credit.

Arthur, Haggard & Co. v. McArthur, 10 Ky. Opin. 340.

§ 300. Extent of liability.

Where a promissory note not discounted by an incorporated bank, not being negotiable as well as payable in bank, one signing on the back thereof is only liable as assignor and can not be sued until the maker of the note has been prosecuted to insolvency.

Jones v. Hampton's Assignee, 8 Ky. Opin. 889.

§ 301. Discharge of indorser.

Unless an assignee of a debt sues at the first term of court after it becomes due, he can not hold his assignor liable on his implied obligation to answer for the non-payment of the debt by reason of the insolvency of the obligor.

Jackson v. McDonald's Admr, 9 Ky. Opin. 616.

If the assigned note is secured by a lien, the assignee must obtain a per-

sonal judgment, and a return of no property found as soon as by reasonable diligence it can be done, and if he postpones his personal judgment or an effort to enforce it, if obtained, until after an enforcement of his lien by a sale of the lien property, his recourse against his assignor can not be enforced by reason of his laches.

Jackson v. McDonald's Admr., 9 Ky. Opin. 616.

An indorser is discharged by the want of diligence to collect from the principal, and where it is sought to hold the indorser because of the insolvency of the principal as an excuse for the want of diligence, the law requires not only the insolvency of the maker, but that it shall be established by a certain character of evidence, and where the petition shows solvency on its face, or that the character of proof demanded can not be produced, no cause of action is set forth.

Arthur, Haggard & Co. v. McArthur, 10 Ky. Opin. 340.

(C) ASSIGNMENT OR SALE.

§ 310. Nature and construction of contract in general.

Failure to assign a note in writing raises the presumption that the sale was made without recourse.

Wright v. Banks' Exr., 5 Ky. Opin. 716.

The terms "assignment" and "transfer," when applied to contracts of sale of promissory notes, are used synonymously by the general public and also, in some instances, by the courts.

Wright v. Banks' Exr., 5 Ky. Opin. 716.

§ 313. Rights of assignee or purchaser.

One who holds an equitable interest in a note occupies an attitude no better than the person under whom he claims.

Wilson, Exr., v. Solomon, 7 Ky. Opin. 729.

Although the simple exchange of a mortgage note given for the purchase-price of real property, for those of a stranger, and which were unsecured, might prima facie, imply a waiver of the lien, the fact that the mortgagee

made the exchange for the accommodation of the mortgagor, who had either removed or was about to remove to another state, and was in doubtful circumstances, and the strong probability that the mortgagee would not otherwise have received his note unsecured in satisfaction of notes amply secured by lien will repel that presumption and authorize the conclusion that the parties intended a mere substitution, which would not extinguish the lien, but only change the debtor and the evidence of the same debt.

Mouring v. Stratton, 2 Ky. Opin. 359.

Where one takes an assignment of a note, knowing that the obligor was a non-resident, he undertakes to pursue his remedy where the debtor resides.

Halsell v. Morgan, 7 Ky. Opin. 405.

§ 314. Equities and defenses against assignee.

Where notes were given to B. by A. and Z. and B. then placed both notes in the hands of R. for collection, and then assigned the receipt of R. to C., and in the absence of proof of a valid sale for a valuable consideration, or a satisfactory explanation as to the different transfers, it is held that creditors of B. could attack the attempted collection of the notes by C. as having been transferred to defraud creditors.

Crawford v. Clark, 2 Ky. Opin. 594.

§ 320.—Set-offs existing before transfer or notice.

The acceptor of a bill of exchange can not set off against it, in the hands of an indorsee, claims against the payee which were subsisting at the time of acceptance.

Red River Iron Co. v. Henderson, 6 Ky. Opin. 183.

§ 321.—Set-offs arising after transfer or notice.

The maker of a note can not claim a set-off against the note for the price of goods, which was executed and delivered more than a year after the goods were delivered, and after the note was executed the maker sought to procure the assignee of the note

to become his surety on a note so that it might pass in payment for the stock of goods.

Martin & Quisenberry v. Hollo-
well, 6 Ky. Opin. 204.

(D) BONA FIDE PURCHASERS.

§ 327. Nature and grounds of protection.

The evidence examined and held sufficient to sustain a judgment for an assignee of a note given by one member of a partnership to another, though there were outstanding partnership accounts unsettled between the partners, prior in date to the note executed and assigned.

White v. Gabbert, 4 Ky. Opin. 314.

A purchaser of a promissory note in good faith for a valuable consideration, before maturity, is a bona fide owner, and can not be deprived of his right to invoke a legal remedy to collect same.

Scott & Wurts v. Bryan & Grubb,
1 Ky. Opin. 424.

§ 331. Actual notice.

§ 332.—In general.

Where one takes the last note with notice of an agreement between the parties that a certain purchase-money note was to have a preferred lien over the remaining part of the unpaid purchase price, he can not complain that the preferred lien was adjudged prior to his.

Hazelrigg v. Trimble, 5 Ky. Opin.
526.

§ 363. Titles and rights acquired by bona fide purchasers.

Where there is an agreement between a debtor and creditor that a note given to evidence the debt shall be paid in lumber, but no mention of this is made in the note, which is a plain note payable in bank, and the note is purchased before maturity for a valuable consideration without notice or knowledge of the agreement as to how it is payable, the innocent holder is protected and may collect it according to its terms.

Mehler & Estenkemper v. Ferguson,
10 Ky. Opin. 178.

§ 364. Defenses as against bona fide purchasers.

§ 365.—In general.

A purchaser of a note, assigned after maturity, takes it subject to all the equities that it would have been subject to in the hands of the payee.

Hopper v. Holtzclau, 2 Ky. Opin.
665.

VI. PRESENTMENT, DEMAND, NOTICE, AND PROTEST.

§ 385. Nature and grounds of requirement of diligence of holder.

Due diligence in protesting and presenting an order for collection is required, and where a defendant fails to show this, he is guilty of laches.

Tucker v. Wright, 4 Ky. Opin. 205.

§ 388. Presentment for acceptance.

It was held that the drawers of bills were not discharged from liability to the payee because of the failure to present the bills to the drawee for payment.

Clark & Duncan, Assignees of
Bank of Bowling Green, v.
Hines & Thomas, 6 Ky. Opin.
556.

§ 389.—Necessity.

The mere allegation of "no funds" in the hands of the drawee is not sufficient to dispense with presentment and notice, since the averment might be true, and yet the drawee may have been under obligation to pay the bill.

England v. Bricken, 7 Ky. Opin.
199.

§ 391.—Sufficiency.

The presentment and demand necessary to make an indorser of a bill or note liable must be made on the last day of grace; and if made after the last day, or before the last day only, such indorser is discharged.

National Bank of Monticello v.
Bryant, 8 Ky. Opin. 727.

§ 408. Protest and certificate thereof.

Protest is not necessary to bind an indorser or acceptor of an inland bill of exchange.

Berte v. Evans, 7 Ky. Opin. 69.

§ 409.—Requisites and sufficiency.

Where a notary, upon diligent inquiry, obtained the information that

the indorser of a bill lived without the city limits, the depositing of notice of protest in the postoffice, which was postpaid and addressed to the surety, on the evening of the day the bill was protected, shows sufficient diligence on the part of the notary in giving the notice.

Ferguson v. Dougherty, 7 Ky. Opin. 429.

§ 411. Sufficiency of notice of nonpayment and of protest.

An irregularity or laches on the part of officers of a bank, in forwarding a notice of protest, by an incorrect direction of the same, is cured by giving notice through the postoffice at which the payor usually receives his mail.

Burks v. Lane, 4 Ky. Opin. 463.

§ 412.—Notice by mail.

Where a notary protested a note and mailed a notice of the protest the next day so that it reached the maker at 1 p. m. on the day following the protest, the action of the notary in mailing the protest was with sufficient diligence.

Arnold v. Coddin's Admr., 6 Ky. Opin. 5.

§ 415.—Place.

Notice of protest for nonpayment should be mailed to a drawer and indorser at his last known postoffice address, and where at the time a bill or note is drawn or indorsed the party resides at a certain place the holder may presume that he resides there at its maturity and send his notice of protest accordingly, unless he has received information of his change of residence; and where there is more than one postoffice where the indorser is in the habit of receiving his letters, notices may be sent to either of such addresses.

Menzies v. Farmers' Bank of Kentucky, 11 Ky. Opin. 634.

VII. PAYMENT AND DISCHARGE.

§ 425. Nature and modes of discharge in general.

An instruction that, "If the payments were made by appellant before the notes were in fact transferred or assigned or before notice of the trans-

fer and assignment, he is entitled to credit for such payments," is proper.

Davis v. DeHaven, 4 Ky. Opin. 301.

Where a day of payment is stipulated in a promissory note and then a covenant inserted securing to the debtor the privilege of extension at his own pleasure, from year to year, by paying the interest annually it is not in conflict with any law or public policy; but when a failure to pay the interest promptly occurs, the privilege is forfeited.

McCormick v. Wilson's Admr., 1 Ky. Opin. 491.

Where an action is founded on the alleged non-payment of a bill of exchange drawn by R. and accepted by B., proof of a different debt is not competent.

Brannin, Summers & Co. v. Ross, 4 Ky. Opin. 294.

§ 428. Mode and sufficiency of payment.

Where no place of payment of a note is fixed the law fixes the place at the residence of the payee.

Lockridge's Admr. v. Stone, 7 Ky. Opin. 35.

§ 430.—New bills or notes.

A court can not presume that the parties, in the renewal of a note, erred in the calculation of the interest due.

O'Brien v. Edmondson, 7 Ky. Opin. 347.

§ 433. Indorsement of payments.

The surety on a promissory note has the right to have all payments made on the note applied as credits.

Armstrong v. Smith, 9 Ky. Opin. 370.

Where it is provided in a promissory note that interest shall be paid at the rate of six per cent., and payments are made on the note, any such payments in excess of such interest must be held as payments on the principal; and the fact that the holder of the note credits them as for interest only will not prevent them from being used to reduce the principal.

Wilson v. Lawson, 9 Ky. Opin. 452.

§ 436. Discharge.

Possession of a note by the payor, if sufficiently proven, is *prima facie* evidence of satisfaction and surrender in the absence of other evidence to explain the possession.

Shrader v. Lewis, 5 Ky. Opin. 790.

§ 439.—Payment or satisfaction by other parties.

A note taken up by a volunteer, though assigned to him without recourse, is discharged as against the obligor, in a suit to enforce its collection.

Murphy & McCalister v. Hughes, Admr., 2 Ky. Opin. 667.

Where the owner indorses a note to the bank for collection against the maker, and pursuant to an agreement between the maker and another, it is paid by such other person, who receives it from the bank to hold it and the vendor's lien to secure him for advancing the money, the holder can not question the authority of the bank to turn the note over to the person advancing the money; since he can not hold the money he receives from the bank and complain that the bank had so such authority, but he must either return the money or satisfy the implied agreement of the bank that the person satisfying such note shall hold it as assignee.

Daugherty v. Weitzel, 9 Ky. Opin. 342.

§ 440. Rights of parties on payment or discharge.

Where a note already due, with several payments credited thereon, is assigned, and by mistake or fraud in the calculation of the credits and interest, the assignor is made to believe that there was only a balance of three hundred and thirty dollars due thereon, when in fact there was at the time six hundred and ninety-three dollars due, a court of equity will compel the assignee to refund to the assignor the amount in excess of the sum supposed to be due when the note was assigned.

Hopkins v. Catlett, 5 Ky. Opin. 506.

VIII. ACTIONS.**§ 441. Right of action.**

In the absence of allegations in a petition on a bill of exchange of notice of dishonor, no action can be maintained against the indorsers, where no proof of notice of dishonor is shown.

Isbell v. Bank of Louisville, 2 Ky. Opin. 241.

§ 445.—Time of accrual.

Where a note at the time the amended petition was filed was not due and no supplemental petition was filed, showing that such note became due before judgment, no judgment can legally be rendered on the same.

Mills v. Chelf, 8 Ky. Opin. 504.

Where a petition on a note shows that it was dated October 4, 1875, and due six months after date, and the suit on it was begun on March 31, 1876, it sufficiently appears that the action is begun before the maturity of the note, and such action must fail where no facts are alleged to bring the case within the statute permitting such an action before the maturity of the note.

Baker v. Ratcliffe, 10 Ky. Opin. 748.

§ 450. Defenses.**§ 451.—In general.**

The defense, that the note sued on was given for a horse sold and purchased with the intent and knowledge of both buyer and seller that the horse was to be used to enable the purchaser to carry on war against the United States, is a valid defense.

Harbitt's Admr. v. Curl, 6 Ky. Opin. 149.

Where appellees plead non est factum to a note, and the evidence as to handwriting leaves the genuineness of the note in doubt, the circumstances greatly preponderate in favor of its validity.

Temple's Admr. v. Beck & Messing Slaughter, 1 Ky. Opin. 161.

The fact that the plaintiffs, who are bankers, charged the amount of the note of B. and S. payable one day after date, to the account of B. in his bank-book on the day of the execution, did not change the character of

the debt nor impair the efficacy of the note.

Boice & Shannon v. Mitchell & Barber, 1 Ky. Opin. 170.

The fact that the obligee failed to procure additional surety on the note is no defense to it.

Murphy v. Hubble, 1 Ky. Opin. 146.

The right to an equitable defense to a note is not impaired by the assignment of the note.

Ford v. Crockett & Hildreth, 1 Ky. Opin. 382.

Mistake by failure to insert a term of credit in an order for goods, which is admitted or indisputably proved, entitles the defendant to an abatement of the action as premature, and, as between drawer and drawee, is an admissible defense.

Crowe & Co. v. Bruce & Co., 2 Ky. Opin. 600.

Where the facts, in an answer to a suit on a note, show it to have been given in consideration of a half interest in a business, and that the plaintiff had made no settlement of the partnership affairs which were in liquidation, it is sufficient to constitute a good defense and a demurrer there-to should be overruled.

Miller v. James, 2 Ky. Opin. 562.

Where a suit is brought on notes by their assignee, who has purchased them for value, nothing can be used as a set-off against him which was not a cause of action against his assignor at the time the appellant received notice of the assignment.

Burns v. Stephenson, 9 Ky. Opin. 602.

§ 452.—Particular grounds.

It is no defense to a suit on notes, to set up an unlawful arrangement between the parties to defraud creditors: since such a defense comes in bad grace from a defendant who has been a party to such a fraud.

Hines v. McCormick, 8 Ky. Opin. 123.

§ 455. Parties plaintiff.

Where a bill of exchange was not indorsed by the deceased's payee, the

legal title was not in the holder of the bill, but in the legal representative of the payee, who was a necessary party to an action by the holder.

Hathaway v. Morris, 6 Ky. Opin. 167.

§ 458. Parties defendant.

A bank has the right to look to the parties to a bill of exchange for payment, and can coerce it out of an indorser in preference to the maker or drawer if it desires to do so.

Sanders v. Merchants' Bank, 7 Ky. Opin. 111.

§ 461. Declaration, complaint or petition.

§ 462.—Form and requisites in general.

Where a note plainly imports a personal obligation of the maker, a petition against the maker in his official capacity as guardian, is demurrable at the instance of the guardian's sureties.

Jesse v. Jones, 6 Ky. Opin. 274.

The petition need not set out the consideration for the assignment of a note.

Farmer v. Milan, 1 Ky. Opin. 344.

In a suit on a note, the possession of it by the plaintiff and filing it with the petition, is sufficient to authorize recovery of the amount due on same, although no distinct averments are made in the petition that the note had been transferred by delivery to plaintiff, together with an affidavit that it was just and due, and that he ought to recover the amount of same.

Jones v. Matheney & Son, 2 Ky. Opin. 261.

In a suit on a promissory note or bill of exchange, where the petition does not aver protest and notice either for non-acceptance or non-payment, nor aver any excuse, as that the drawer had no funds or authority from the drawee to draw upon him, the petition is subject to a general demurrer.

Henley v. Trimble, 2 Ky. Opin. 271.

Where a petition fails to allege that the plaintiff was the owner or holder

of the bill in litigation, it does not constitute a cause of action.

Blaydes v. Glum & Sons, 3 Ky. Opin. 706.

In order to recover an attorney's fee, provided for in a note, the petition should have averred the payment of same by the holder of the note.

Smith v. Kohn & Wile, 4 Ky. Opin. 517.

A petition which fails to allege that the drawer and indorser of the bill of exchange were notified of the protest is bad on demurrer.

Nunnally v. Zachary, 4 Ky. Opin. 199.

An allegation in a petition on a protested bill, that "said parties to the same were duly advised of said acceptance being protested," is insufficient to state a cause of action under Civ. Code, § 118, it being a conclusion of the pleader that the law had been complied with.

Arnold v. Williams, 4 Ky. Opin. 462.

The appellee filed the note with his petition, with the assignment indorsed thereon, and this was evidence sufficient to authorize the rendition of the judgment against the appellant; since the assignee of appellee was before the court and entitled to assert the legal rights of the appellee himself, so far as they applied to the note in controversy.

Holt v. McGrew, 5 Ky. Opin. 348.

If the payee of a bill intends to hold the drawer responsible for the amount on the grounds of want of funds in the hands of the drawee, such fact must be averred in the petition, and it must be further averred that the drawee had notice of the protest.

Baird v. Claney, 5 Ky. Opin. 223.

A defect in a petition on a note, in failing to allege non-payment of the note, is cured by an answer which alleges its non-payment.

Heck v. Northwestern Mfg. Co., 7 Ky. Opin. 143.

Where the allegations of a petition on a note were inconsistent with the

statement which was made a part of the note, it was held that a demurrer was properly sustained to the petition.

Nunn v. O'Brien, 7 Ky. Opin. 169.

Where a note contains a statement of the articles sold, and for which the note was given to the extent that the statement is contradictory to the petition, the statement must control.

Nunn v. O'Brien, 7 Ky. Opin. 169.

A petition to collect a note must state by its own allegations a good cause of action, and the absence of material allegations in a pleading cannot be supplied by the exhibits referred to by the pleader.

Taylor v. Guteman, 9 Ky. Opin. 184.

A petition based upon a promissory note, to be good as against a demurrer, should aver a promise to pay.

Huffaker v. Bank of Monticello, 9 Ky. Opin. 194.

A complaint on a promissory note is insufficient to support a judgment when it fails to aver an indebtedness or a promise to pay on the part of a defendant.

Berry v. Chapman, 9 Ky. Opin. 350.

A plaintiff, in order to recover on a note, must aver in his pleading that the defendant is indebted to him or owes him something and has promised to pay it.

Berry v. Chapman, 9 Ky. Opin. 350.

The filing of the note or a copy thereof as a part of the petition will not obviate the necessity of setting out the promise or agreement, as it is necessary to aver a promise or agreement to pay.

Ray v. Redman, 9 Ky. Opin. 591.

The petition on a promissory note must contain within its own body, and not merely by reference to another paper or exhibit, a statement of the facts constituting the cause of action; and to aver in such a petition that defendant executed his note to plaintiff, without averring a promise to pay, is but pleading a conclusion and not a fact.

Corbin v. Oldham's Admx., 10 Ky. Opin. 767.

A plaintiff who sues on a promissory note must aver that the defendant undertook, agreed or promised to do that which he is sued for failing to perform, or facts must be alleged from which the law will imply a promise, which can not be done when the averment is that the defendant executed his note to the plaintiff, of a given date, for a given amount, payable at a certain time.

Corbin v. Oldham's Admx., 10 Ky. Opin. 767.

A petition to collect a note must contain an allegation showing that the defendant promised to pay, and the execution of the note sued on will not obviate the necessity of setting out the undertaking, promise or agreement.

Goodpastor v. Richart, 11 Ky. Opin. 326.

To be sufficient a petition on notes must allege a promise on the part of defendants to pay, and where it is attempted to enforce a lien on property facts must be alleged showing such lien, an allegation that plaintiff has a lien on property being merely the conclusion of the pleader.

Kentucky Electric Institute v. Gaines, 11 Ky. Opin. 833.

§ 466.—Nature of contract.

In declaring upon a promissory note, the pleader must set out the material stipulations of the promise and its breach, and a failure to do so will not be cured by filing the note as a part of the petition.

Huffaker v. Bank of Monticello, 8 Ky. Opin. 694.

§ 472. Plea, answer, or affidavit of defense.

Inasmuch as the original answer failed to state that the discovery that the representations were false and fraudulent, was not made until after the execution of the note, it was not sufficient.

Gayle v. Elam, 5 Ky. Opin. 694.

The injured party may by counterclaim, in a suit on a note, recover any damage he has sustained by reason of the failure of the obligee to procure additional surety.

Murphy v. Hubble, 1 Ky. Opin. 146.

In an action on a demand draft, where the answer avers that the time of payment by agreement between the drawer and drawee, had been extended some four months, it is error to sustain a demurrer to the answer.

Crowe & Co. v. Bruce & Co., 2 Ky. Opin. 600.

Where a promissory note has been assigned without the knowledge of the payee, he is entitled to a set-off against the same to the amount he has paid the assignor before he knew of the assignment.

Offutt v. Kenny, 2 Ky. Opin. 121.

On a plea of non est factum, where the evidence shows that the defendant recognized his obligation after the execution of the note, the court should have instructed the jury that although they should believe from the evidence that F. had never signed the note, yet if they should believe from the testimony that he had, since the signature, recognized his liability on it, they should find against him.

Jones' Admr. v. Forsythe, 4 Ky. Opin. 277.

§ 473.—Form and requisites in general.

An answer to a complaint to collect a promissory note is insufficient, which admits that the defendant executed the note sued on, but that it was executed through a mistake and a lack of knowledge of the true amount of his indebtedness to plaintiff, and that said note was executed for at least \$57 too much, but does not state how the mistake occurred.

Kackler v. Ebersole & Glasscock, 9 Ky. Opin. 290.

§ 474.—Traverses or denials and admissions in general.

An answer to a petition on a note, which merely alleges want of information or knowledge as to whether the debt was due as recited in the petition, and avers want of knowledge or information as to whether plaintiffs acquired possession of the note in the manner alleged, is virtually a confession of the truth of the matters alleged in the petition.

Allen v. Mitcherson, 6 Ky. Opin. 621.

§ 475.—Execution and delivery of instrument.

A plea of non est factum is supported by proof showing that a note after execution was altered so as to provide for interest from date instead of after maturity, as it originally provided; and where the consideration for the note was the sale of cattle an action may still be maintained for the price of the cattle, but this must be by the original payee or his assignee.

First National Bank of Springfield v. Dawson, 11 Ky. Opin. 26.

§ 477.—Mistake, fraud, or duress.

An answer to a suit on a note is good which avers that the note was given as a part of the purchase money of land, and that the vendor, to induce him to purchase and execute the note in question, fraudulently represented that he had a fee simple title, and that plaintiff had only a life estate in such land, and that by such fraudulent representations he had been induced to purchase, and by reason of the defect in the title to the land he had been damaged \$250.

Turley v. Kelly, 9 Ky. Opin. 768.

§ 484.—Payment and discharge.

A plea of payment to a suit on a debt is good which sets up a contemporaneous contract showing that plaintiff had agreed to accept as payment the performance of certain advertising and supplying certain newspapers, which the defendant had performed and supplied.

Mosby v. Hatcher, 8 Ky. Opin. 10.

Where a suit is brought on a note which is more than ten years overdue and the defense of payment is made, it is incompetent for plaintiff, in his effort to weaken the conclusion that payment had been made that might arise from the long delay in bringing suit to show that he had other notes which he had not sued on although they were many years overdue, since such evidence throws no light on the question of payment and is incompetent.

Worthington v. Miller's Admr., 11 Ky. Opin. 708.

§ 486. Replication or reply and subsequent pleadings.

A reply to an answer to a suit in a

note is sufficient when it contains a denial that the sum sued for is for interest calculated on defendant's debt at a greater rate of interest than six per cent.

Grimes v. Williams, 11 Ky. Opin. 28.

§ 488. Setting out, annexing, filing or production of instrument, and profert and oyer.

Filing the evidence of a debt, a note, with the petition without the assignment of the payee therein, by the plaintiff, he having the possession and making the averment that he was the owner, is prima facie evidence of his right to the debt, and puts the onus on the defendant, if he questions the right of the plaintiff, and the evidence of the debt being filed becomes a part of the record.

Allen v. Randle & Tyler, 5 Ky. Opin. 215.

In an action on a promissory note the writing should be referred to and filed with the petition, but failure to do so is not ground of demurrer, the appropriate remedy being by rule to compel the production of the note.

Brackett v. Adams, 5 Ky. Opin. 71.

§ 490. Presumptions and burden of proof.

A promissory note will be presumed to contain all the evidence of the indebtedness as well as the entire agreement between the parties, and where there is a written agreement to extend the time, it must be so stated in the pleadings, otherwise it amounts only to the averment that the parties agreed by parol at the time of the contract or before.

Schmidt v. Miller's Admr., 10 Ky. Opin. 228.

§ 499.—Payment.

Where the allegations that an indorsement was fraudulent, without consideration, and made when the bill was past due, are denied, the burden of proof is on the plaintiff.

Davis' Exrs. v. Hane, 1 Ky. Opin. 487.

In a suit on a note, where the plea of no consideration is relied on as de-

fense which was controverted by reply, the burden of proof is on the defendant.

Henry & Yeizer v. Hughey, 1 Ky. Opin. 285.

The consideration in a note not being expressed, it is permissible to allege and prove by parol that it was executed and delivered for no good and valuable consideration.

Bostick v. Lindsay, 4 Ky. Opin. 468.

Where there is a plea of no consideration, in a suit on a note, the onus is on the defendant to establish it by proof of that fact.

Foreman v. Hope Ins. Co., 5 Ky. Opin. 181.

It is error, on the trial of an issue of non est factum, to permit the plaintiff, against the objections of the defendant, to prove certain papers produced by the witness to have been executed by the defendant, and to submit them to the jury, to prove by comparison, that the note sued on was signed by the defendant.

Jones v. Barber, 5 Ky. Opin. 482.

§ 500. Admissibility of evidence.

A mere parol agreement to extend the time of payment of a note is in contradiction of the note itself, and therefore inadmissible.

Fagan v. Elam, 2 Ky. Opin. 365.

An order drawn by the secretary of a turnpike company on the treasurer, is evidence of an indebtedness of the amount from the drawer to the payee.

Miller's Admr. v. Maxville Tpk. R. Co., 2 Ky. Opin. 658.

§ 515. Weight and sufficiency of evidence.

The production and possession of a note is prima facie evidence of ownership.

Berryman v. Cook, 1 Ky. Opin. 240.

§ 524.—Possession as evidence of ownership.

The possession of a bill of exchange is prima facie evidence of ownership of the bill, and having been made a part of the petition, no other evidence

of ownership is necessary, but in the absence of other evidence of title the payee or his legal representative should be made to appear to the action.

Hathaway v. Morris, 6 Ky. Opin. 167.

§ 528. Amount of recovery.

In an action on a note for the price of a mill, defendants are entitled to a recoupment of the damages resulting to them from breach of warranty.

Beaver v. Dishman & Galloway, 6 Ky. Opin. 154.

In an action on a note, the amount of recovery, after deducting certain set-offs and credits, stated.

Small v. Calhoun, 6 Ky. Opin. 553.

Where notes were payable in "confederate treasury notes," upon failure to so pay at the time stipulated for payment, the measure of damages is their value at the time and place of payment.

Lockridge's Admr. v. Stone, 7 Ky. Opin. 35.

§ 540. Judgment.

Where joint obligors are sued on a note, a judgment against one of them does not prevent a judgment against the other at a subsequent term, although both were served with process at the same time.

Ullman & Co. v. Cloyd, 5 Ky. Opin. 336.

Where a suit is brought on two notes and the same defense was made to both of them, and the second note was not due, and for that reason alone the cause was reversed, but in that case the defendant pleaded and introduced proof on his set-off and counterclaim, and the court decided against the validity of such set-off, it amounts to an adjudication and is res adjudicata.

Burns v. Stephenson, 11 Ky. Opin. 589.

Where a note is reduced to a judgment, the note merges in the judgment, and thereafter the note being in possession of the executor of the estate of the holder of the judgment, he has no right to assign the same

and the assignee thereof has no title or claim to it.

Webster v. Webster, 13 Ky. Opin. 545.

§ 542. Appeal.

Where in a suit on a note, the law and the facts are submitted to the court, its judgment thereon is final, and may be appealed from without first making a motion for a new trial; such preliminary step being only necessary in cases where trials have been had and verdicts rendered by a jury.

Armstrong v. Smith, 9 Ky. Opin. 370.

BOARD.

Assignment of contract for board, see

Assignments, § 94.

Liability of defendant for, during confinement in jail, see Costs, § 292.

BONA FIDE PURCHASERS.

See Bills and Notes, V, D;

Fraudulent Conveyance, §§ 198, 199, 203;

Judicial Sales, § 11;

Vendor and Purchaser, V, C.

Liability for mechanic's lien, see Mechanic's Liens, § 204.

Purchaser after maturity of note, see Bills and Notes, § 365.

BONDS.

I. REQUISITES AND VALIDITY.

§ 3. Parties.

§ 4.—Obligors and obligees.

§ 12. Execution in general.

II. CONSTRUCTION AND OPERATION.

§ 48. General rules of construction.

§ 50. Common law or statutory bonds.

V. ACTIONS.

§ 114. Right of action.

§ 121. Jurisdiction and venue.

§ 123. Pleading.

§ 124.—Declaration, complaint, or petition.

§ 129. Evidence.

§ 130.—Presumptions and burden of proof.

See Recognizances.

Administrator's and executor's bonds, see Executors and Administrators, XII.

Amount of attachment bond, see Attachment, § 132.

Appeal bond, see Appeal, § 372.

Bail bond, see Bail, §§ 54, 63.

Breach of tavern keeper's bond, see Intoxicating Liquors, § 88.

Cancellation of corporate bonds, see

Cancellation of Instruments, § 2.

Claimant's bond, see Attachment, § 298.

Committee's bond, see Insane Persons, § 45.

Costs bond, see Costs, IV.

Form and requisites of attachment bond, see Attachment, § 132.

Guardian's bond, see Guardian and Ward, § 15.

Indemnity bond, see Indemnity, § 4; Sheriffs and Constables, § 89.

Injunction bond, see Injunction, § 148.

Liability of clerk of court on official bond, see Clerks of Courts, § 73.

Liability of sheriff on official bond, see Taxation, § 568.

Liability on administration bond, see Executors and Administrators, XII.

Liability on appeal bonds, see Appeal, XVIII.

Liability on attachment bond, see Attachment, X.

Liability on cost bond, see Costs, § 139.

Liability on executor's bond, see Executors and Administrators, § 26.

Liability on guardian's bond, see Guardian and Ward, VIII, § 92.

Liability on injunction bonds, see Injunction, VIII.

Liability on receiver's bond, see Receivers, § 212.

Liability on replevin bond, see Replevin, VII.

Liability on sheriff's bond, see Sheriffs and Constables, IV.

Limitation of action on bond, see Limitation of Actions, § 22.

Municipal bonds, see Municipal Corporations, XIII, C.

Of administrator, see Executors and Administrators, § 26.

Of committee of insane person, see Insane Persons, § 45.

Of executor, see Executors and Administrators, § 26.

Official bonds, see Officers, IV.

Of guardian, see *Guardian and Ward*, VIII, § 15.

Of marshal, see *Officers*, § 35.

Of master commissioner, see *Equity*, § 398.

Of purchaser at judicial sale, see *Judicial Sales*, §§ 18, 27.

Of receiver, see *Receivers*, § 51.

Of street railway company, see *Corporations*, § 468.

Of tax collector, see *Taxation*, § 568.

Of trustee, see *Trusts*, § 161.

Peace bond, see *Breach of the Peace*, § 22.

Requisites and sufficiency of bail bond, see *Bail*, § 11.

Validity of corporate bonds, see *Corporations*, § 415.

Replevin bond, see *Replevin*, §§ 33, 49, 120.

Title bond, see *Vendor and Purchaser*, § 26.

I. REQUISITES AND VALIDITY.

§ 3. Parties.

§ 4.—Obligors and obligees.

Where, pursuant to the provisions of the act of February, 1872, empowering a turnpike company to issue its bonds, a company issues its bonds and executes a mortgage to secure the bondholders, and the officers and directors are the creditors, and the transaction is in good faith, such bonds will be held valid even though issued by such directors to themselves, when they have advanced the money to build the road.

Old State Road & Ripple Creek Tpk. Co. v. Smith, 10 Ky. Opin. 624.

§ 12. Execution in general.

Where a clerk so far neglects his duties as to take and attest a bond without getting the names of the proposed securities (and which had been approved by the court) to it in such a manner as to bind them, he and his sureties are liable for this official misconduct.

Chamberlin & Tapp v. Brewer, 3 Ky. Opin. 178.

II. CONSTRUCTION AND OPERATION.

§ 48. General rules of construction.

Mistakes in the issue of a bond

given can be corrected like mistakes in other instruments, where it is shown that a prior bond for the same purpose had been executed.

Taylor v. Taylor, 4 Ky. Opin. 253.

In locating land, natural objects called for in the patent must govern, but if they have been destroyed and can not be located, then the courses and distances given must be resorted to; but there can be no reason why courses should prevail over distances called for.

Popular Mountain Coal Co. v. Dick, 7 Ky. Opin. 420.

A bond to the commonwealth for securing payment to the person entitled to receive it, is virtually a bond to that person, and is, therefore, a good statutory bond in substance and effect.

Bottom v. Caldwell's Trustee, 3 Ky. Opin. 634.

§ 50. Common law or statutory bonds.

Where the trustee of the jury fund of Daviess county, without an order from court, filed a second bond, which was approved as the first one had been, and contained the name of only one of the original sureties, the second bond was not a cumulative one, but a renewal in entirety.

Commonwealth v. Blair, 1 Ky. Opin. 238.

V. ACTIONS.

§ 114. Right of action.

Before recovery of amounts due on a bond can be had, it must be shown that payments made by the commissioner to the distributees of an estate were advances by him personally, and not of a fund alleged to have been paid in full discharge of the bond.

Gunter v. Hill & Duncan, 3 Ky. Opin. 144.

§ 121. Jurisdiction and venue.

A common-law obligation can only be proceeded upon in a court having civil jurisdiction.

Commonwealth v. Skeeters, 10 Ky. Opin. 924.

§ 123. Pleading.

§ 124.—Declaration, complaint, or petition.

To be sufficient, a petition for a breach of covenant, the bond sued upon should be set forth in substance so as to show the undertaking of the parties, and to make the bond a part of the petition does not supply these averments.

Anderson v. Hays, 10 Ky. Opin. 167.

The stipulations of a bond upon which a recovery is sought must be alleged in the petition in order that the liability of the bondsmen may be determined, and the breach must also be alleged.

Smithinson's Admr. v. Ulurlen's Admr., 10 Ky. Opin. 340.

§ 129. Evidence.

§ 130.—Presumptions and burden of proof.

The legal presumption of validity attaches to a bond, and extraneous evidence of invalidity should so far overcome the evidence of validity as to rebut the legal presumption of genuineness.

Chamberlin & Tapp v. Brewer, 3 Ky. Opin. 178.

BOOK ACCOUNT.

See Account, Action on, § 16.

BORROWING.

Directors of corporation borrowing money to pay losses, see Corporations, § 460.

BOUNDARIES.

I. DESCRIPTION.

§ 3. Relative importance of conflicting elements.

§ 4. Natural and permanent objects.

§ 7. Location of corners.

§ 8. Location of lines.

§ 10. Maps, plats, and field notes.

§ 12. Waters and water courses.

§ 16.—Unnavigable streams, lakes, and ponds.

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II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

§ 34. Admissibility of evidence.

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§ 46. Agreements between parties.

§ 47. Estoppel in general.

§ 49. Practical location by parties.

§ 50. Adjudication by public authorities.

§ 51.—In general.

§ 54. Official surveys.

Arbitration of boundary line, see Arbitration and Award, § 82.

Boundary line by prescription, see Adverse Possession, § 19.

Equitable relief in case of confusion of boundary, see Equity, § 15.

Extension of boundaries of town, see Municipal Corporations, §§ 26, 29.

Misrepresentations as to boundaries, see Contracts, § 258.

Submission of disputed boundary line, see Arbitration and Award, § 79.

I. DESCRIPTION.

§ 3. Relative importance of conflicting elements.

Where a watershed on a certain ridge is adopted by the grantor and the grantee as a corner of a certain survey, such natural object will control in the absence of a marked line, and courses and distances must give way to it.

Ratcliff v. Kitchen, 7 Ky. Opin. 112.

In case of a disputed boundary, if the commissioners have run the lines and fixed the corners in making the allotment, such corners and lines must govern, and if there is a mistake by which all the land is not included in the division, it can be corrected only

by a court of equity, and not by ejectment.

Louisville & N. R. Co. v. Mitchell,
7 Ky. Opin. 144.

In conflicting conveyances, the natural objects or monuments called for in the description must prevail over a specific description of that locality contained in the conveyance.

Curtis v. Kinnead's Exx., 10 Ky. Opin. 920.

For a means of arriving at a proper boundary line between adjoining land-owners, see opinion.

Warmoth v. Fitchen, 13 Ky. Opin. 307.

§ 4. Natural and permanent objects.

Where the degrees or courses in a deed differ from the natural or artificial object designating the boundary, the courses must yield to it.

Winscott v. Bricken's Exr., 5 Ky. Opin. 723.

Corner trees which are proven to the calls of a patent are prima facie evidence that the survey was so located.

Seale v. Brandenburg, 5 Ky. Opin. 791.

Where the lines and corners correspond with the immovable and natural objects as fixed by the survey, the courses and distances must yield, and on the contrary when the lines and courses have been effaced courses in the patent govern.

Seale v. Brandenburg, 5 Ky. Opin. 791.

Where a boundary line is to be determined between two land owners, courses and distances called for in the deed must yield to monuments or local objects called for in the description.

Kidwell v. Houston, 8 Ky. Opin. 386.

§ 7. Location of corners.

It was held that the surveyor in attempting to locate a disputed corner should locate it at the point fixed by the commissioners who made division of the land.

Louisville & N. R. Co. v. Mitchell,
7 Ky. Opin. 144.

Evidence of reputation is admissible to establish an ancient corner or boundary but it is not evidence of reputation for a witness to say that he ascertained from others that a certain point was a boundary; for it is the province of the court and not of witnesses to weigh the evidence and draw conclusions, except where witnesses testify as experts, when they may sometimes give opinions on questions of fact.

Brooks v. Frizby, 9 Ky. Opin. 454.

§ 8. Location of lines.

Boundary lines of land may be designated by physical or natural objects set up for that purpose by the owners, or fixed and established by the surveyor in the presence of witnesses, or both means, and in such cases the exact location of a given line must be proven by witnesses.

Roberts v. Collett, 6 Ky. Opin. 671.

Although a boundary line agreed to by parol in 1868 is not enforceable in a contest over it in 1875, yet the fact that it was made furnishes strong evidence that the line agreed upon is the true line; and where persons interested in establishing such line, who are not parties to the agreement, were present at least a part of the time it was being run and were fully advised of the purpose for which it was run, made no objections to it, they are to a certain extent bound by it, and good faith required them to make known the fact that they would not abide by the line as run, and the chancellor should not interfere to relieve them by establishing a different line, unless the evidence is clear that the agreed line is not the true line.

Phillips v. Eades, 10 Ky. Opin. 907.

A parol agreement establishing the boundary between distinct tracts of land may be enforced in a court of equity.

Threldkeld v. Winston, 10 Ky. Opin. 956.

It is the general rule that when a boundary line is drawn between given points, it is to be a straight line

passing from one point to the other by the nearest course.

Crutcher v. Shelby R. R. Dist. of Shelby Co., 11 Ky. Opin. 404.

§ 10. Maps, plats, and field notes.

The purchasers of lots from the parties who made out and recorded the plat are bound by the plat, in the absence of a showing that the plat does not correctly describe the lots, streets and alleys.

McGregor v. Brown, 7 Ky. Opin. 586.

§ 12. Waters and water courses.

The doctrine of accretion, as decided in 3 Bush, 3 Bibb (Yoder v. Swope & Hardin, 259), is not applicable to small streams and branches, but to navigable streams, and a deed, "bounding on the creek," etc., means to the edge of the creek and not to the center.

Miller v. Layne, 4 Ky. Opin. 524.

A patent that calls to run from a point of beginning with the meanders of a river necessarily imports that the river is the boundary; and though the courses and distances as designated may not always correspond with the sinuosities of the river, yet, as in all other cases of apparent and generally accidental divergence the natural boundary controls and defines the land appropriated.

Devaxhier v. Buford, 2 Ky. Opin. 612.

§ 16.—Nonnavigable streams, lakes, and ponds.

Where a conveyance is made of so much of a tract of land as is bounded on one side by a highway and on the other by a branch, it means to the center of the branch and can not be construed to embrace land on the opposite side of such branch.

Benningfield v. Luchett, 13 Ky. Opin. 577.

§ 18.—Meandered waters.

The mere fact that the surveyor of land adjoining the Ohio river called for natural objects on the river bank, in running the line up and down the river, is no evidence that the line is the boundary line, it constituting a mere meander line, and the title of

the owner of such land extends to the low water mark.

Camerson v. Beatty, 13 Ky. Opin. 242.

§ 19. Roads, ways, and public grounds.

Where the last line of the lot, according to the calls of the deed, must run with the line of P. street, which is known and recognized by the parties and is made the southern boundary of the lot, that being an established lipe, the courses in the deed must be made to conform to that line.

Hargraves v. Pope, 5 Ky. Opin. 549.

§ 20.—Public ways.

A conveyance calling for objects on the margin of a highway and running with it, passes the fee to the center of such highway, where there is nothing in the deed to show a contrary intention.

Campbell v. Royce, 10 Ky. Opin. 743.

§ 24. Priority of grants and deeds.

When patents conflict as to a boundary, the first entry and claim in the absence of an actual occupancy and enclosure within the interference must prevail.

Thacker v. Crawford, 12 Ky. Opin. 521.

II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

§ 34. Admissibility of evidence.

§ 35.—In general.

The field notes of the original surveyor are competent evidence to establish a boundary line.

Carman v. Johnson, 3 Ky. Opin. 623.

Though a deed may pass no title it may be admitted as evidence of boundary.

Kelly v. Kelly, 1 Ky. Opin. 328.

Visible or actual boundaries of land, whether natural or artificial, are to be taken as the abutments of a survey so long as they can be found or proven, and it is only in case the description in a conveyance is ambiguous or doubtful that parol evidence of practical construction given by the parties, by acts of occupancy, recog-

nition of monuments or boundaries, or otherwise, is admissible in aid of the interpretation.

Cissel v. Rapier, 11 Ky. Opin. 553.

In a suit to determine the ownership and boundaries of land, the record of a judgment ordering the sale of the land and the purchase thereof by the appellant at commissioner's sale is competent evidence to show title and to connect the appellant with those who were divested of title by the sale made in pursuance of the judgment.

Jones v. Spaulding, 12 Ky. Opin. 525.

§ 36.—Documentary evidence.

Those claiming and holding the possession of real estate under a deed of conveyance to their ancestor are bound by the boundary of the land as described in such deed, where there is no allegation of mistake made in such calls or an attempt to reform the deed.

Marshall v. Brown, 12 Ky. Opin. 193.

The best evidence of the boundary of real estate is the recorded deed which conveys it; and where fraud or mistake is alleged it will require stronger proof than the mere declaration of the parties to contradict the plain stipulations of the written instrument.

McGill v. Cromwell's Gdn., 12 Ky. Opin. 259.

§ 37. Weight and sufficiency of evidence.

A large surplus is not per se proof of a substantial deviation from the original survey.

Powell v. Davis, 2 Ky. Opin. 137.

The report of survey and designation of boundary made in the presence of the appellant without objection to its accuracy, and acquiesced in by him for many years, is prima facie evidence against him, and it was a continued admission of its accuracy.

Powell v. Davis, 2 Ky. Opin. 137.

Where appellant in a suit with G. in 1838 alleged that D. owned the land to a line even 26 poles higher up the river than that fixed by the pro-

cessioner, such record concessions are alone persuasive if not conclusive, against the appellant.

Powell v. Davis, 2 Ky. Opin. 137.

Where the line running S. 60½ E. to three beech trees is precisely coincident with the line designated in the conveyance from F. to D. in the year 1820, this being a strong fact and corroborated by the long and undisturbed fence on the line, by the ancient marks upon it and by the actual possession for many years, it establishes a boundary.

Craycroft v. Greenly, 3 Ky. Opin. 644.

§ 38. Trial of issues.

§ 39.—Conduct in general.

The manner of locating a patent, when there is ambiguity in the calls, is a question of law to be determined by the court, and can not be submitted to a jury.

Roberts v. Collett, 6 Ky. Opin. 671.

§ 41.—Instructions.

An instruction in an action involving the boundary of land, that if the lot or boundary or the division between the heirs commenced at a corner at the intersection of the two lines running from the lines T and B as appears on the plat, at a stake, the corner should be fixed where these lines intersect, and if the position of the corners called for as P's corner by the commissioner is not identified by the proof, the stake called for as P's corner should be fixed by running the line in the course called for from the intersection to the end of the distance, and in so running the line it leaves the station of the defendants and the improvements with the land in controversy outside of plaintiff's boundary, the verdict should be for the defendants, is a correct statement of the law.

Louisville & N. R. Co. v. Mitchell, 7 Ky. Opin. 144.

Where there is conflict of evidence as to where the boundary line between real estate in controversy ran, it is error for the court to instruct the jury to find for the defendant.

Kenton Furnace R. Co. v. Lowder, 10 Ky. Opin. 844.

§ 43. Judgment and enforcement thereof.

Where there is a suit to fix the boundary of certain land and all the owners of such land are parties to it, and by the judgment therein the boundary is fixed, such boundary is settled for all time, and the vendees of such litigants must abide by such settlement.

Hanes v. Gardner, 12 Ky. Opin. 253.

§ 46. Agreements between parties.

Where there is room for, and there actually is a controversy between adjoining land owners as to the correct boundary line between their lands, and by agreement they settle upon a line, it is binding upon both.

Culbertson v. McCullum, 12 Ky. Opin. 7.

§ 47. Estoppel in general.

The appearance and entering of objections to some of the acts of the processioners, is held to waive formal notice of the time and place of their meeting.

Berry v. Wheatley's Heirs, 2 Ky. Opin. 269.

§ 49. Practical location by parties.

A parol agreement fixing a dividing line is binding on the parties.

Elms v. Hunt, 6 Ky. Opin. 361.

A compromise line used by both claimants is the best evidence of the boundary.

Sawtell v. English, 4 Ky. Opin. 541.

A compromise line established by remote vendors was held to be binding upon a feme covert and her infant children.

McGuir v. Neely, 5 Ky. Opin. 601.

Adjoining landowners who agreed upon a disputed boundary line and occupied their lands in respect to it for fifteen years, are estopped to dispute its location.

Finn v. Rochford, 13 Ky. Opin. 357.

Courts of equity will favor and enforce compromise agreements as to boundary lines between landowners when such agreements are shown to

have been made and are binding on both parties; but such courts will not enforce them where a mere verbal agreement establishing a division line is alleged for the first time after nine years and after one of the parties is dead, and when for the first time the offer is made to comply with such agreement, especially where it does not clearly appear that such agreement was made and acted upon by either party.

Smith v. Stewart, 13 Ky. Opin. 705.

§ 50. Adjudication by public authorities.**§ 51.—In general.**

Where a commissioner is directed to convey certain real estate by a description to extend to a boundary determined by the court as between parties claiming to different boundaries and the commissioner conveys, not following the description as determined by the court, his grantee can not open up the litigation by asserting the boundary as used by the commissioner, the boundary as fixed by the judgment will govern his rights.

Spradlin v. May, 13 Ky. Opin. 612.

§ 54. Official surveys.

Where the owners of land agree upon a partition line and each occupy their respective parcels up to that line for a long time by themselves and vendees, a court of equity will not disturb it, although there might have been a mistake in the written evidence of the partition.

Samuels v. Crowell, 2 Ky. Opin. 29.

Where the original owners of land recognize a specific line or landmark in conveyance as a boundary, and their vendees for more than twenty-five years afterwards accepted and used it in accordance with such recognition, such boundary will not be disturbed, and will not be affected by a junior conveyance attempting to go beyond the line, a prior conveyance having included the land in the junior one down to the boundary in controversy.

Field v. Pascal, 2 Ky. Opin. 232.

BOUNTIES.

§ 8. Destruction of wild animals.

The law provides that the person killing an animal for which a reward is to be paid must state the time and the county in which the killing was done, and both are required to be certified.

Stafford v. Commonwealth, 3 Ky. Opin. 497.

BREACH OF MARRIAGE PROMISE.

§ 1. Requisites and validity of contract.

§ 2.—In general.

§ 10. Breach of contract.

§ 13. Defenses.

§ 1. Requisites and validity of contract.

§ 2.—In general.

An agreement to marry is like all other agreements in which the undertakings of the parties to it are to be performed at the same time, and where the obligation and duty of either to perform his or her undertaking necessarily depends upon the concurrent performance of the other, cannot, of course, be carried out except by the mutual consent, good faith and contemporaneous action of both the contracting parties, and hence, neither party can be said to be in default or guilty of a breach of such agreement to marry the other unless the other is ready and willing to be married at the time and place agreed upon.

Squires v. Hancock, 5 Ky. Opin. 767.

The same capacity is required to make a contract to marry upon a contingency that is requisite to make an absolute contract to marry at a future time; and a contract must be valid when entered into or it never can be valid.

Webb v. Forman, 8 Ky. Opin. 697.

§ 10. Breach of contract.

Where there is an agreement to marry and no time is agreed upon for the ceremony to take place, there is a breach of such contract when

such marriage is not consummated within a reasonable time thereafter.

Clark v. Phillips, 12 Ky. Opin. 20.

§ 13. Defenses.

Where appellant alleges in his answer that appellee was before and after the date of the alleged and pretended contract of marriage, guilty of lewd and lascivious conduct, such as showed her to be unchaste and unfit for a wife, of which he had no knowledge at the times specified, and all of which was against his consent, the words lewd and lascivious each import, not only great moral delinquency, but the actual unlawful indulgence of lustful passions, and such indulgence by one of the parties to a contract to marry, without the procurement or fault of the other, would present a sufficient legal excuse for the refusal of the party not in fault to execute the contract.

Squires v. Hancock, 5 Ky. Opin. 767.

Where in a defense to a suit brought by a woman for breach of contract to marry, the defendant pleaded that she was an unchaste woman, the fact that she gave birth to an illegitimate child would have been sufficient to authorize the jury to find for him; but evidence is admissible to show that the defendant is the father of the child and that she had been chaste as to all other persons.

Clark v. Phillips, 12 Ky. Opin. 20.

BREACH OF THE PEACE.

§ 15. Security to keep the peace.

§ 22.—Liabilities on bond.

Where an accused person gives bond to keep the peace, his conviction thereafter for drunkenness and disorderly conduct is not a breach of the terms of such bond, and where a proceeding is for an alleged breach shown by judicial conviction, unless the record thereof exhibits the breach, there is a failure of proof and the breach can not be shown by alteration of the record by parol evidence.

Commonwealth v. Mahoney, 11 Ky. Opin. 133.

BRIDGES.**I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.**

§ 6. Establishment by public authorities.

§ 9.—Liabilities for expenses.

II. REGULATION AND USE FOR TRAVEL.

§ 34. Liabilities for injuries.

§ 36.—Care required of bridge companies and proprietors.

Appointment of bridge commissioner, see *Mandamus*, § 28.

Liability of county for construction of, see *Counties*, § 105.

I. ESTABLISHMENT, CONSTRUCTION AND MAINTENANCE.

§ 6. Establishment by public authorities.

§ 9.—Liabilities for expenses.

If a bridge is directed to be built by an order of court without any price being named, or if the price was named and it becomes necessary to sue for its value, the county may be sued and the amount due the contractor be ascertained by the verdict of a jury or judgment of the court.

Pusey & Summers v. Meade County, 9 Ky. Opin. 510.

The agreement of the county justices to pay for the erection of a bridge is not binding, unless their action is official, and to show this the record of the county court must be produced.

Pusey & Summers v. Meade County, 9 Ky. Opin. 510.

II. REGULATION AND USE FOR TRAVEL.

§ 34. Liabilities for injuries.

§ 36.—Care required of bridge companies and proprietors.

Where defendants' bridge was out of repair, and by reason thereof an animal fell through it, and such animal in falling frightened plaintiff's horse but did not come in contact with it, plaintiff can not recover from the owner of the bridge for injury received to himself or horse, as the injury to plaintiff and his property was not the

natural consequences of negligence of allowing the bridge to become out of repair.

Hall v. Lebanon & Maysville Tpk. Co., 8 Ky. Opin. 476.

BRIEFS.

See *Appeal*, XII.

Form and requisites of, see *Appeal*, § 756.

BROKERS.**I. REGULATION AND CONDUCT OF BUSINESS IN GENERAL.**

§ 3. Licenses and taxes.

II. EMPLOYMENT AND AUTHORITY.

§ 8. Evidence of agency.

§ 12. Authority conferred.

§ 17.—Loan of money.

III. DUTIES AND LIABILITIES TO PRINCIPAL.

§ 19. Nature of broker's obligation.

IV. COMPENSATION AND LIEN.

§ 39. Right to compensation in general.

§ 44. Revocation of authority.

§ 47. Sufficiency of services of broker.

§ 52.—Completion of negotiations.

See *Pawnbrokers*; *Principal and Agent*.

I. REGULATION AND CONDUCT OF BUSINESS IN GENERAL.

§ 3. Licenses and taxes.

Contracts made by broker carrying on business without a license from the federal government can not be enforced.

Crosthwaite v. Wigne, 4 Ky. Opin. 658.

II EMPLOYMENT AND AUTHORITY.

§ 8. Evidence of agency.

Where in the pleadings, there is a conflict as to the terms of an agreement the court will assume the contract to be according to the custom and usage between the brokers and

their customers in relation to transactions of a like character.

Ricketts v. Crittenden, 2 Ky. Opin. 499.

§ 12. Authority conferred.

Where under a contract by a broker and his customer, "it is agreed between C. and W. that if the margin became exhausted, W. should sell said stock any loss sustained on such sale of said stock should be paid by C. to W.," and "W. was to carry and hold the stock for an account of C. until W. should be directed by C. to sell said stock or to deliver same to C.," W. was the agent of C. to the extent to sell said stock, and W. held and carried the stock under a contract of pledge.

Worthington v. Crutcher, 4 Ky. Opin. 436.

§ 17.—Loan of money.

Where H. made application to F. to secure for him \$5,000, and B. conducted the negotiations; and F. sought and secured the money from W. W. N., a son of A. M. N., and the notes to H. were made to and endorsed by B., and delivered to W. W. N., it was a loan of money and not a sale of the notes to A. M. N.

North v. Haggins' Admr., 2 Ky. Opin. 474.

III. DUTIES AND LIABILITIES TO PRINCIPAL.

§ 19. Nature of broker's obligation.

A broker is a mere negotiator between other parties and never acts in his own name, but in the name of those who employ him; he is not intrusted with the custody or possession of the goods; he is employed to sell and is not authorized to buy and sell in his own name.

Graham & Co. v. Duckwall, Fitch & Co., 5 Ky. Opin. 495.

A broker is bound to obey strictly the order of his customer or principal in relation to keeping or disposing of stocks in his hands, and so long as the principal keeps up his margin, the broker is not authorized to dispose of the stocks; should he do so he would be liable to his principal for the highest price the stocks may have

attained during the time of the transactions.

Ricketts v. Crittenden, 2 Ky. Opin. 499.

Where a firm of brokers, acting on the request of their client to replace a purchase made for him on a prior transaction, buys the commodity at the price at which it has been previously sold to protect the interest of the client, he can not be heard to complain of a loss to him sustained thereby, although he may have repudiated the second purchase on the day on which it was made.

McPherson v. Tucker, 2 Ky. Opin. 244.

Where under a contract the appellants did not have the right to accept and reject orders from appellee at pleasure, and his margin was sufficient to authorize the purchase of stocks on his order, and the refusal of appellants to buy stocks for the appellee resulted in a loss to him of \$7,000, such loss was the direct and immediate consequence of a plain and palpable violation by appellants of their contract with appellee, and they are responsible for the loss.

Alexander & Co. v. Cain, 5 Ky. Opin. 176.

IV. COMPENSATION AND LIEN.

§ 39. Right to compensation in general.

A co-purchaser of real estate, notwithstanding the relation of confidence between purchasers, may recover a commission from the seller of such real estate earned before he became associated with the other purchasers.

Gormley v. Alexander, 9 Ky. Opin. 45.

§ 44. Revocation of authority.

A real estate broker is entitled to a commission, where it appears that the owner did not in good faith withdraw the property from the market, but in a few days after the pretended withdrawal, sold the land to persons whom the agent had in effect procured.

Houchland v. Hodges, 6 Ky. Opin. 381.

§ 47. Sufficiency of services of broker.
 § 52.—Completion of negotiations.

One holding a contract from the owner of real estate for a commission for finding a purchaser therefor at a given price is entitled to his commission where he furnishes a purchaser at the price named even though the sale and conveyance is not consummated on account of the refusal of the owner's wife to agree to join him in a conveyance.

Cook v. Fryer, 11 Ky. Opin. 455.

BUILDING AND LOAN ASSOCIATIONS.

§ 6. Membership.

§ 25. Loan.

§ 33.—Usury.

§ 6. Membership.

Where the right to withdraw at any time upon terms that are reasonable and just is secured to members of a building and loan association by the organic law of the association, and such terms have been once prescribed and fixed, upon the faith of which, it may be, persons became members, the association can not subsequently take away the rights of such members to withdraw and take the settlement provided.

Louisville German Building and Loan Assn. v. Wissing, 11 Ky. Opin. 822.

Where a building and loan association has by by-law provided for the withdrawal of its members and fixed the portion or share to which a withdrawing member should be entitled upon his withdrawal, the repeal of such by-law in so far as it provided the basis of such settlements was inoperative and void so far as it released the association from its obligation to take back or purchase the stock of withdrawing members, becoming members after the adoption of said by-law.

Louisville German Building and Loan Assn. v. Wissing, 11 Ky. Opin. 822.

§ 25. Loans.

§ 33.—Usury.

Money forced from a shareholder in a building and loan association

for preference in borrowing money may, under some conditions, be regarded as interest, and where, when added to other interest charges, it exceeds the legal rate, is usurious and can not be collected.

Lipscomb v. Central Building Assn. of Covington, 9 Ky. Opin. 432.

BUILDING CONTRACTS.

Alteration, see Contracts, § 232.

Compensation of contractor, see Contracts, § 231.

Compliance with specifications, see Contracts, § 231.

Damages for breach, see Damages, § 120.

Defective performance, see Damages, § 123.

Departure from specification, see Contracts, § 296.

Extra work, see Contracts, §§ 231, 232.

Rescission, see Contracts, § 272.

BUILDINGS.

Erected on leased premises by agent—

When personalty, see Property, § 3.

Right to destroy in order to arrest conflagration, see States, § 86.

BURDEN OF PROOF.

See Alteration of Instruments, § 26; Evidence, III.

Action for malicious prosecution, see Malicious Prosecution.

Action for slander, see Libel and Slander, § 122.

Allegation of fraud, see Fraud, § 50.

As to mental capacity of testator, see Wills, § 288.

As to notice of sale, see Judicial Sales, § 37.

Burden of proving agency, see Principal and Agent, § 19.

Grounds of attachment, see Attachment, § 211.

In action for animals killed, see Railroads, § 433.

In action for conversion, see Trover and Conversion, § 35.

In action for failure of carrier to deliver goods shipped, see Carriers, §§ 132, 137.

In action for loss or injury to goods shipped, see Carriers, § 132.

In action for slander, see Libel and Slander, § 101.
 In action on account, see Account, § 18.
 In attachment, see Attachment, § 22.
 In contest of wills, see Wills, § 288.
 In criminal prosecution, see Criminal Law, §§ 326, 327.
 In ejectment, see Ejectment, § 86.
 In ejectment to show that land in controversy is not within exception, see Ejectment, § 86.
 In equity proceedings, see Equity, § 346.
 In suit to set aside mortgage as fraudulent, see Fraudulent Conveyances, § 270.
 Of acceptance of deed, see Deeds, § 63.
 Of agreement to devise property to claimant, see Wills, § 68.
 Of loss by fire, see Warehousemen, § 34.
 Of mistake in contract, see Contracts, § 340.
 On defendant in ejectment to show superior title, see Ejectment, § 86.
 On propounders of will, see Wills, § 52.
 On trustee to show that trust property has been accounted for and paid out, see Trusts, § 372.
 Proof beyond reasonable doubt, see Homicide, § 144.
 Proof of mortgage, see Contracts, § 348.
 Shifting of Burden, see Wills, § 52.
 Showing application of payment, see Payment, § 64.
 Suit to subject wife's property in payment of husband's debt, see Husband and Wife, § 231.
 To establish estoppel, see Partnership, § 217.
 To establish fraud, see Fraud, § 50.
 To establish new contract, see Corporations, § 519.
 To explain erasure, see Alteration of Instruments, § 27.
 To show agency, see Principal and Agent, § 19.
 To show falsity of representations by insured, see Insurance, § 646.
 To show forfeiture of insurance policy, see Insurance, § 370.
 To show fraud in purchase of corporate stock, see Cancellation of Instruments, § 45.
 To show fraud or mistake, see Fraud, § 50.

To show good and valid consideration for conveyance, see Fraudulent Conveyance, § 271.
 To show justification for homicide, see Homicide, § 151.
 To show knowledge of fraud, see Sales, § 357.
 To show mental incapacity, see Deeds, § 68.
 To show that party signed receipt, see Estoppel, § 91.
 To show title in claimant, see Adverse Possession, § 112.
 To show title to land, see Vendor and Purchaser, § 210.
 Under answer setting up usury, see Usury, § 113.
 Under plea of want of consideration, see Bills and Notes, § 499.
 When on defendant in action on note, see Bills and Notes, §§ 488, 499.
 When on defendant in foreclosure proceedings, see Mortgages, § 460.
 When on mortgagor to show that property was separate estate, see Mortgages, § 134.
 When on plaintiff in action on note, see Bills and Notes, § 499.
 When on railroad company as to animals killed, see Railroads, § 441.

BURGLARY.

II. PROSECUTION AND PUNISHMENT.

- § 17. Indictment or information.
- § 20.—Description of building.
- § 25.—Breaking and entry.
- § 30. Admissibility of evidence.
- § 31.—In general.
- § 40. Weight and sufficiency of evidence.
- § 41.—In general.
- § 44. Trial.
- § 46.—Instructions.

Joinder of indictment for burglary and robbery, see Indictment and Information, § 127.

II. PROSECUTION AND PUNISHMENT.

- § 17. Indictment or information.
 - § 20.—Description of building.
- A house used for storing grain and other things, falls within the description of "outhouse" under a statute

making it an offense to break into an outhouse.

McHatton v. Commonwealth, 13 Ky. Opin. 536.

§ 25.—Breaking and entry.

If a window is closed, a door shut or the floor laid down; the breaking in by forcibly removing the one or opening the others, is sufficient breaking to constitute burglary, if done in the night-time with a felonious intent; and it is a sufficient unlawful entry to constitute the breaking charged if done with intent to steal.

Scott v. Commonwealth, 9 Ky. Opin. 915.

An indictment for housebreaking with intent to steal is not good against a demurrer when it fails to charge the breaking with intent to steal therefrom any named article of value, the property of another, since it is not sufficient to charge the breaking with intent to steal.

Smith v. Commonwealth, 10 Ky. Opin. 261.

In an indictment for housebreaking it is only necessary to allege the manner in and the intent with which the house was broken, and the allegation that the accused did actually steal was unnecessary to complete the offense.

Maden v. Commonwealth, 11 Ky. Opin. 674.

§ 30. Admissibility of evidence.

§ 31.—In general.

In the trial of one charged with housebreaking with intent to steal it is competent to admit evidence tending to prove that the defendant did steal things from the storehouse, since this evidence shows the motive and intent of the breaking.

Maden v. Commonwealth, 11 Ky. Opin. 674.

§ 40. Weight and sufficiency of evidence.

§ 41.—In general.

A confession of guilt of a crime charged, will not warrant a conviction unless accompanied with other proof that such an offense was committed, but where evidence shows that a house was broken into and certain property was missed therefrom, taken

with the confession of the accused, is sufficient to sustain such a conviction.

Brown v. Commonwealth, 13 Ky. Opin. 559.

§ 44. Trial.

§ 46.—Instructions.

The term felony, used in the definition of the crime of burglary, embraces any crime which was a felony at common law, whether it is now punished as a felony or not, and it was not error for the court to charge the jury that breaking into a dwelling in the night time with intent to steal any property of another therefrom was burglary.

Williams v. Commonwealth, 10 Ky. Opin. 245.

In the trial of a cause for housebreaking with intent to steal, it is error for the court to instruct the jury that the possession or failure to account for the possession of any of the stolen goods, which they might believe, from the evidence, were found with the accused, would authorize them to convict him.

Maden v. Commonwealth, 11 Ky. Opin. 674.

BURIAL GROUNDS.

See Cemeteries.

BUSINESS.

Conspiracy to injure, see Conspiracy, § 8.

BYSTANDER'S BILL.

See Exceptions, Bill of, § 54.

CANCELLATION OF INSTRUMENTS.

I. RIGHT OF ACTION AND DEFENSES.

§ 2. Right to cancellation.

§ 3.—In general.

§ 5.—Unconscionableness, improvidence, or hardship.

§ 18. Estoppel or waiver.

§ 19. Conditions precedent.

§ 20.—In general.

§ 21.—Performance by plaintiff.

§ 29. Persons as to whom instruments may be cancelled.

II. PROCEEDINGS AND RELIEF.

§ 34. Limitations and laches.

§ 36. Pleading.

§ 37.—Bill, complaint, or petition.

§ 44. Evidence.

§ 45.—Presumptions and burden of proof.

§ 54. Relief awarded.

§ 55.—In general.

§ 60. Judgment or decrees and enforcement thereof.

Cancellation of deed because of mistake, see Deeds, §§ 69, 70.

Conditions prerequisite to cancellation of deed, see Deeds, § 70.

Demurrer to petition to set aside deed, see Deeds, § 184.

Failure to offer to do equity in suit to set aside conveyance, see Descent and Distribution, § 88.

Misrepresentation as grounds for, see Deeds, § 70.

Rescission by equitable action, see Deeds, § 178.

Setting aside fraudulent conveyances, see Fraudulent Conveyances, III, C. Sufficiency of answer, see Deeds, § 184.

I. RIGHT OF ACTION AND DEFENSES.

§ 2. Right to cancellation.

§ 3.—In general.

A corporation was held to have the right to the cancellation of its bonds which were issued in payment for stock in a railroad company, by payment of the accrued interest and 66 2-3 cents on the dollar on the face value of the bonds.

Kentucky Coal, &c., Co. v. Lexington, &c., R. Co., 7 Ky. Opin. 131.

Equity will not grant relief to persons who execute a release of a mortgage upon a valuable consideration without fraud or misrepresentation, because of a mistake of fact, where they could by equity have ascertained the true state of facts.

Eldridge v. Bromley's Exrs., 6 Ky. Opin. 746.

If the grantor of real estate has no title and knows it, and this fact was

unknown to the grantee at the time of the execution of the deed, and was fraudulently concealed from him by the grantor, such grantee is entitled to have the deed canceled.

Staton v. Christian, 8 Ky. Opin. 785.

One who is induced to purchase real estate by the false representation of the seller that vacant ground in front of it is a street may have such contract of sale rescinded, since a vendee had the right to rely on the representations of the seller which prevented him from ascertaining the facts.

Maupin's Admr. v. Pace, 11 Ky. Opin. 204.

The acceptance of a deed to real estate does not deprive the grantee of the right to have the contract rescinded on the ground of fraud; and where one having no title conveys real estate to an ignorant man, and to get him to accept falsely represents to him that he has good title when he has no title whatever, the contract will be rescinded at the suit of the grantee, who does not have to rely on his warranty and to sue for its breach.

Henderson's Trustee v. Fahey, 13 Ky. Opin. 892.

§ 5.—Unconscionableness, improvidence, or hardship.

A contract of purchase made between parties, one of whom is weak minded and the other a bright, experienced business man, whereby the weak minded is deprived of his property for much less than its value, will be canceled and set aside as obtained by fraud.

Boarman's Com. v. Gardner, 13 Ky. Opin. 900.

§ 18. Estoppel or waiver.

Where a conveyance of land is made by an old man to his grandchildren partly because of his love for them, and their agreement to remain with and care for him, his request and permission given them to go away, under his statement that he would send for them when he needed them, amounts to a waiver of any breach of their contract to stay with him, and

the deed will not be canceled on account of their leaving him a part of the time under such permission.

Davenport v. Crisp, 11 Ky. Opin. 930.

§ 19. Conditions precedent.

§ 20.—In general.

After a plaintiff, in an action for a rescission for want of title, has mortgaged the land for near its value, and when they do not tender a release upon instituting the action, they are not entitled to the relief asked for.

Harris & Martin v. Neeley, 10 Ky. Opin. 627.

§ 21.—Performance by plaintiff.

Where plaintiffs sued to cancel a mortgage executed by them, and defendant answered resisting the right to have the mortgage cancelled, an allegation that he acquired title to the property, and if not, that he is willing to take a good title thereto, the chancellor is not compelled to go in search of a title for defendant, nor are the plaintiffs required to make an exhibit of the title they have when not called upon to do so.

Hawkins v. Parker, 6 Ky. Opin. 637.

§ 29. Persons as to whom instruments may be cancelled.

Whilst the general equity rule that feeble intellect, with inadequacy of price, with but slight circumstances evidencing fraud or over-reaching will suffice to cause cancellation of a contract, yet when such contract has been acquiesced in for more than fourteen years, and the land has gone into the hands of innocent purchasers, there should be great preponderating evidence and circumstances against the sale before the property rights of innocent purchasers should be disturbed.

Tiller v. Kidwell, 2 Ky. Opin. 383.

II. PROCEEDINGS AND RELIEF.

§ 34. Limitations and laches.

In a suit to set aside a deed, the court may consider the lapse of time intervening between the date of the deed and the beginning of the suit as a circumstance showing to some

extent the good faith of the transaction or the lack of good faith.

Netherland v. Calvin, 10 Ky. Opin. 777.

§ 36. Pleading.

§ 37.—Bill, complaint, or petition.

The petition in an action to set aside a contract for the conveyance of land and the railroad stock, made by the husband in behalf of his infant wife, was held to state a cause of action.

Weller v. Weller, 7 Ky. Opin. 549.

Although a petition assailing a mortgage as fraudulent, is defective, in not averring the nonpayment of the debt, this defect is waived, unless raised by demurrer before judgment.

McCord v. Miner, 3 Ky. Opin. 490.

§ 44. Evidence.

§ 45.—Presumptions and burden of proof.

One seeking to set aside a contract he has entered into and to get back real estate which he has conveyed in consideration of stock in corporations, on the ground that the person trading him the stock made false and fraudulent representations as to the value of the stock and the progress of the company, has the burden of showing he was induced to purchase the stock by fraud on the part of the seller, and that such representations were false and known to be false, and were intended to mislead him, and that he relied upon them.

Lyons v. Osborne, 13 Ky. Opin. 689.

§ 54. Relief awarded.

§ 55.—In general.

Where a contract is rescinded for fraud the chancellor should place the parties in statu quo as nearly as possible.

Musselman v. Knott, 13 Ky. Opin. 773.

§ 60. Judgment or decree and enforcement thereof.

Where the allegations show fraud and a right to the cancellation of an entire contract, and a restoration of the appellant's land, the prayer for a reconveyance of title and also for

general relief authorizes any decree which the facts show to be equitable.
Willis v. Sewell, 3 Ky. Opin. 647.

CARE.

See Negligence.

As to animals seen on or near railroad track, see Railroads, § 419.

In operation of street railroad, see Street Railroads, § 80.

Of railroad company as to person on or near track, see Railroads, §§ 357, 375.

Required of bailee of horse, see Bailment, § 13.

Required of bank cashier, see Banks and Banking, § 54.

Required of carrier of passengers, see Carriers, § 280.

Required of Pledgee, see Pledges, § 30.

Required of railroad company to prevent injury to animals, see Railroads, § 405.

Required of servant, see Master and Servant, § 229.

To prevent damage by fire, see Railroads, § 453.

CARRIERS.

II. CARRIAGE OF GOODS.

(A) DELIVERY TO CARRIER.

§ 39. Duty of carrier to receive and transport goods.

(B) BILLS OF LADING, SHIPPING RECEIPTS, AND SPECIAL CONTRACTS.

§ 61. Contracts for transportation of goods.

§ 63.—Construction and operation.

(C) CUSTODY AND CONTROL OF GOODS.

§ 72. Rights of consignor and consignee in general.

(E) DELAY IN TRANSPORTATION OR DELIVERY.

§ 96. Time of transportation and delivery in general.

(F) LOSS OF OR INJURY TO GOODS.

§ 108. Nature of liability as common carrier.

§ 118. Negligence of agents or servants.

§ 126. Actions for loss or injury.

§ 132.—Presumptions and burden of proof.

§ 133.—Admissibility of evidence.

§ 137.—Instructions.

(H) LIMITATION OF LIABILITY.

§ 147. Nature of right to limit liability.

§ 149. Liabilities subject to limitation.

§ 150.—Negligence or misconduct.

(I) CONNECTING CARRIERS.

§ 180. Limitation of liability.

(J) CHARGES AND LIEN.

§ 196. Actions for charges.

III. CARRIAGE OF LIVE STOCK.

§ 214. Loss or Injury.

IV. CARRIAGE OF PASSENGERS.

(A) RELATION BETWEEN CARRIER AND PASSENGER.

§ 237. Who are passengers.

§ 242.—Shippers and their agents accompanying shipment.

§ 246.—Evidence.

(C) PERFORMANCE OF CONTRACT OF TRANSPORTATION.

§ 273. Actions arising out of breach of contract.

§ 276.—Evidence.

§ 277.—Damages.

(D) PERSONAL INJURIES.

§ 280. Care required and liability of carrier in general.

§ 282. Persons to whom carrier is liable.

§ 283. Acts of omissions of carrier's employees.

§ 303. Setting down passengers.

§ 304. Care as to persons accompanying passengers.

§ 309. Actions for injuries.

§ 315.—Issues, proof, and variance.

§ 317.—Admissibility of evidence.

§ 319.—Damages.

§ 321.—Instructions.

(E) CONTRIBUTORY NEGLIGENCE OF PERSON INJURED.

§ 342. Contributory negligence as ground of defense.

§ 344.—Presumptions and burden of proof.

(F) EJECTION OF PASSENGERS AND INTRUDERS.

§ 353. Persons objectionable as passengers.

Declarations of employes of carrier, see Evidence, § 123.

Injury to passengers, see Shipping, VIII.

II. CARRIAGE OF GOODS.

(A) DELIVERY TO CARRIER.

§ 39. Duty of carrier to receive and transport goods.

Persons by becoming the owners of a railroad and assuming the character of common carrier are bound to carry all goods delivered for transportation, and they are also bound to know by whom their depot is kept, and by whom their business is done.

Potts v. Bowler, 1 Ky. Opin. 133.

Conceding that the evidence conduced to prove, and did prove, that the defendants did not know that B. was assuming to act for them in the reception of the wheat, and that they had never knowingly approved or sanctioned such assumption, or recognized his appointment as sub-agent, nor his acts as such; still the evidence proves that the wheat was delivered to B. and put inside the depot, and that B. had before and after been acting as freight agent by appointment, and with the knowledge of the regularly appointed agent, and these facts impose on the carrier the obligation to carry and deliver the wheat.

Potts v. Bowler, 1 Ky. Opin. 133.

Strangers or other persons delivering goods for transportation are not bound to inquire whether the person found at the depot ready to receive goods is authorized to transact such business, and the carriers can not evade their responsibility for failure to carry and deliver goods so received.

Potts v. Bowler, 1 Ky. Opin. 133.

(B) BILLS OF LADING, SHIPPING RECEIPTS, AND SPECIAL CONTRACTS.

§ 61. Contracts for transportation of goods.

When it appears by the proof that a special contract was made with a carrier for the delivery of freight under circumstances of fairness and

good faith, the burden is on the shipper to show that the contract ought not to be enforced because unfair and of its having been imposed upon him in a way that prevented him from examining it and understanding it.

Adams Express Co. v. Guthrie, 8 Ky. Opin. 454.

§ 63.—Construction and operation.

Where there is no special contract by which a carrier agrees to transport and deliver a package to a given place and to deliver it to a named person, and it was known to the owner of the package that the carrier's boat did not run to the place of the destination of the package, the law implies a contract only to carry the package to the destination of the boat, and there deliver it to or re-ship it by another common carrier of good repute.

Freese v. Valley Wharfboat Co., 9 Ky. Opin. 729.

(C) CUSTODY AND CONTROL OF GOODS.

§ 72. Rights of consignor and consignee in general.

Where a consignee makes advances on tobacco shipped him by commission merchants, such advancing does not give him the exclusive right to control it except to sell so much of same as is necessary to reimburse him; nor does it give him the right to reship to a foreign market, without the consent, express or implied, of the consignors.

Fatman & Co. v. Brown, 1 Ky. Opin. 490.

(E) DELAY IN TRANSPORTATION OR DELIVERY.

§ 96. Time of transportation and delivery in general.

It is the duty of a common carrier to transport the chattels it undertakes to carry within a reasonable time, and if it fails to do so it is liable for damages.

Cincinnati Southern Ry. Co. v. Potts Bros., 10 Ky. Opin. 394.

(F) LOSS OF OR INJURY TO GOODS.**§ 108. Nature of liability as common carrier.**

A common carrier is an insurer of the goods transported by it, while a warehouseman is liable only for want of ordinary care.

Fowler, Lee & Co. v. Gano, 6 Ky. Opin. 319.

§ 118. Negligence of agents or servants.

Where an express company has reasonable time to deliver goods or a reasonable time to offer to deliver them, it is responsible for the value of the goods lost by reason of being taken by robbers.

Cressap v. Adams Express Co., 1 Ky. Opin. 295.

Where goods are injured in transit, it not being the result of any improper conduct on the part of the consignee, he can not be held responsible for the damages, and is only accountable to the consignor for the price received for the damaged goods.

Fatman & Co. v. Brown, 1 Ky. Opin. 490.

§ 126. Actions for loss or injury.**§ 132.—Presumptions and burden of proof.**

A carrier is only required to satisfactorily show that a special contract was entered into under circumstances indicating fairness and good faith, it then being incumbent on the shipper to show that the contract ought not to be enforced.

Adams Express Co. v. Loeb & Bloom, Ky. Opin. 7.

Where it is shown that the defendant received plaintiff's trunk as a common carrier, the burden is on the defendant to establish such a state of facts as will release it from liability for non-delivery of the trunk.

Louisville, C. & L. R. Co. v. Hume, 7 Ky. Opin. 499.

Where a carrier admitted having received the trunk in question, and also that it was a common carrier, it devolves upon the carrier to show the manner in which it received the trunk, and failing to do so, the pre-

sumption arises that the undertaking was within the scope of its business.

Louisville C. & L. R. Co. v. Hume, 7 Ky. Opin. 499.

Where a suit is brought against an express company for failure to deliver a package, and the failure is proved, the burden to show the terms of the contract fixing the value of such package is on the company, and when it fails to aver and prove such contract the plaintiff is entitled to recover the actual value of such package.

Adams Express Co. v. Meglery, 9 Ky. Opin. 382.

§ 133.—Admissibility of evidence.

The evidence should be confined to the issues raised by the pleadings.

Louisville, C. & L. R. Co. v. Hampton's Exr., 7 Ky. Opin. 296.

§ 137.—Instructions.

Where in a suit against an express company for failure to deliver a parcel, the company offers no excuse for its failure to deliver the package, the court properly instructed the jury to find for the plaintiff for the full value of the package.

Adams Express Co. v. Meglery, 9 Ky. Opin. 382.

(H) LIMITATION OF LIABILITY.**§ 147. Nature of right to limit liability.**

While the liability of a common carrier may be limited to a certain extent by a contract fairly made with the shipper, such carrier may not be released by such a contract from damages caused by the negligence of its agents or servants in charge of the train.

Louisville & N. R. Co. v. Lockman, 9 Ky. Opin. 817.

§ 149. Liabilities subject to limitation.**§ 150.—Negligence or misconduct.**

A common carrier can not contract against its own negligence and thus escape its liability, but its liability may be enlarged or lessened by contract.

Cincinnati Southern Ry. Co. v. Potts Bros., 10 Ky. Opin. 394.

(I) CONNECTING CARRIERS.**§ 180. Limitation of liability.**

If a passenger on a railroad train

takes his position outside of a passenger coach and the employees of the company charged with running the train know it and either consent or do not object to it, and injury thereby results, the railroad company will be held liable.

Kentucky Central R. R. Co. v. Thomas, 13 Ky. Opin. 269.

(J) CHARGES AND LIEN.

§ 196. Actions for charges.

Where it is not alleged that at the time the freight was demanded and paid, that appellants did not know that the sums demanded were more than by the terms of the contract appellees were entitled to receive, consequently the payments were neither made by mistake nor by the deceit of appellees, but with a full knowledge of all the facts, the petition does not state a cause of action.

Brandies & Crawford v. Lewis, 5 Ky. Opin. 155.

III. CARRIAGE OF LIVE STOCK.

§ 214. Loss or injury.

Where a railroad company gives a through bill of lading to Louisville to a shipper of live stock, and does not operate a line of railroad to such destination, and by reason of delay in sending the stock forward on a line connecting its terminus with the point of destination the stock are damaged, the shipper may recover from the road issuing such bill.

Paducah & E. R. Co. v. Blasscock, 10 Ky. Opin. 458.

IV. CARRIAGE OF PASSENGERS.

(A) RELATION BETWEEN CARRIER AND PASSENGER.

§ 237. Who are passengers.

§ 242.—Shippers and their agents accompanying shipment.

Where the shippers of live stock, under the rules of the railroad company, are only entitled to passes for one attendant for each two cars of live stock shipped, but who were ignorant of such rule, and are given passes by the agent of the company for a greater number of attendants

than allowed by such rule which are not recognized by the conductor of the company's train, who without rudeness or force requires such extra passengers to get off the train, the company is liable to them for their actual damages caused by being put off, but the company is not liable for vindictive damages.

Louisville & N. R. Co. v. Sanders, 8 Ky. Opin. 568.

§ 246.—Evidence.

Where one enters a railroad passenger car the trainmen have a right to assume that she is a passenger and had boarded the train for the purpose of going to some other point on the road.

Parks v. Kentucky Central R. Co., 11 Ky. Opin. 552.

(C) PERFORMANCE OF CONTRACT OF TRANSPORTATION.

§ 273. Actions arising out of breach of contract.

§ 276.—Evidence.

Where one purchased a ticket of a railroad company to be transported on its passenger train from Shelbyville to Louisville, and the company failed to take the passenger to the place of destination as speedily as the usual course of transportation demands, there is a breach of contract for which the company is liable, but where it is alleged in a petition that the failure to place such passenger on the first train and the delay in waiting two hours for the second train, gave her a severe cold resulting in pneumonia from which she died, such allegations only show a breach of contract, and such a breach can not be converted into a tort so as to admit the dying declarations of the intestate as to the cause of the injury and as to the wilful neglect of the defendant.

Brown's Admr. v. L. C. & I. R. R. Co., 13 Ky. Opin. 442.

§ 277.—Damages.

Where a common carrier sold a railroad ticket, to a passenger, from Louisville to Lebanon, and accepted such passenger, but failed to stop at Lebanon long enough for the passenger to get off, in a suit against the

carrier the passenger is entitled to recover for his loss of time and money caused by such neglect of the carrier, as well as for other injuries which were the direct and immediate consequences of such neglect and the amount of damages he sustained by reason of the carrier's failure to put him off at Lebanon, and the jury may also consider the mental and physical sufferings, if any, caused by such failure.

Dawson v. Louisville & N. R. Co.,
13 Ky. Opin. 226.

(D) PERSONAL INJURIES.

§ 280. Care required and liability of carrier in general.

Where a passenger whom a carrier has agreed to transport to a certain point leaves the train before it stops at such point, and is injured, the carrier is not liable for damages on account of such injury.

Louisville & N. R. Co. v. Wilkerson, 8 Ky. Opin. 671.

The fact that the plaintiff in a damage suit against a railroad company was not a passenger on the car, and the fact that the driver of the car on which plaintiff was riding may have been guilty of negligence, constitutes no defense, since the railroad company is bound, as to all persons, to use ordinary care to avoid injuring them, and it can not excuse its own negligence by showing that the negligence of a third person contributed to the injury.

Newport St. R. Co. v. Johnson, 11 Ky. Opin. 35.

§ 282. Persons to whom carrier is liable.

Where a passenger has left the car and while he is on the platform, and the conductor, while standing on the lower steps, his body protruding, started the train and his body struck the passenger on the platform, injuring him, it will amount to negligence, for it is the company's duty to give such passenger a reasonable time to place himself beyond danger before putting the car in motion.

Smith v. Louisville City Railway,
10 Ky. Opin. 174.

The fact that a passenger has stepped from the train onto the railroad platform, does not terminate the the railroad company's liability, for it is its duty to have prevented any injury to the passenger by the cars, and if those operating the car saw such passenger's peril and failed to exercise proper care to protect him the company would be liable.

Smith v. Louisville City Railway,
10 Ky. Opin. 174.

§ 283. Acts or omissions of carrier's employees.

In a suit for personal injury caused by a wreck of a railroad train, the company is liable where it is shown that the company's employes in charge of the train failed to exercise that degree of care and skill in operating such train which experience has shown to be reasonably necessary to the safe transportation of passengers, under the usual and ordinary circumstances which experience has shown will arise, which failure resulted in a wreck and the plaintiff's injury.

Kentucky Central R. Co. v. McMurtrey, 11 Ky. Opin. 509.

§ 303. Setting down passengers.

Where a carrier of passengers undertakes to transport a passenger from one point to another it is bound to stop its train and permit such passenger to get off at the point to which it has agreed to carry him, and failing to do so is liable to him for breach of its contract.

Louisville & N. R. Co. v. Wilkerson, 8 Ky. Opin. 671.

The fact that a carrier violates its contract to transport a passenger to a certain point by failing to stop at such point, does not warrant such passenger in leaving the train while it is under headway, and if he did so, and in consequence is injured, he is without remedy; since he can hold the carrier for breach of its contract only, but not for his own folly.

Louisville & N. R. Co. v. Wilkerson, 8 Ky. Opin. 671.

§ 304. Care as to persons accompanying passengers.

Where one goes on a passenger train to assist another to a seat, and

before leaving the train finds that it has started, instead of trying to jump from the train she should apprise the conductor of the fact that she desires to leave the train, and her want of judgment in jumping from a moving train can not be made the basis of a recovery against the company for injury caused by such jump.

Parks v. Kentucky Central R. Co.,
11 Ky. Opin. 552.

§ 309. Actions for injuries.

§ 315.—Issues, proof, and variance.

Where one who sued for the death of another based her case upon the negligence and carelessness or mismanagement of the "servants and agents in charge of the passenger trains" of the defendant, she can not recover upon proof of negligence on the part of others, but must confine herself to the issues thus made.

Louisville, C. & L. Ry. Co. v. Hampton's Exrx, 7 Ky. Opin.
296.

§ 317.—Admissibility of evidence.

In an action against a railroad company for the negligent death of plaintiff's deceased, proof of the condition of the track at the point of injury is competent to show negligence on the part of the engineer in running over the track at high speed.

Louisville, C. & L. R. Co. v. Hampton's Exrx, 7 Ky. Opin.
296.

§ 319.—Damages.

In an action against a railroad company for damages on account of injury to a passenger, the plaintiff has a right to compensation for the injury sustained, and all such further injury, temporary or permanent, that directly resulted from the injury complained of.

Kentucky Central R. Co. v. McMurty, 11 Ky. Opin. 509.

§ 321.—Instructions.

In a suit against a railroad company for damages caused by injury to a passenger, it is sufficient to charge that plaintiff was on board the train as a passenger; that the company had undertaken for compensation to transport him to his destination on its road; and that its train ran off the track and injured the plaintiff by rea-

son of the negligence of those in charge of the train, since this constituted a cause of action, and it is not necessary to allege what was done by the conductor causing the accident; as that would be to require the plaintiff to plead the evidence.

Kentucky Central R. Co. v. McMurty, 11 Ky. Opin. 509.

(E) CONTRIBUTORY NEGLIGENCE OF PERSON INJURED.

§ 342. Contributory negligence as ground of defense.

§ 344.—Presumptions and burden of proof.

Where there is ample room in the passenger cars of a railroad company a passenger who places himself in a more dangerous position upon the train, his negligence is *prima facie* shown and the burden is cast upon him to avoid it.

Kentucky Central R. R. Co. v. Thomas, 13 Ky. Opin. 269.

(F) EJECTION OF PASSENGERS AND INTRUDERS.

§ 353. Persons objectionable as passengers.

A conductor had no right to eject an intoxicated passenger who was conducting himself in a proper manner except that he was insisting that he had paid his fare while he was holding the ticket in his hand, where another offered to pay his fare, which the conductor refused to accept, and ejected the passenger because "he had lied to him."

Kentucky Cent. R. Co. v. Houston,
7 Ky. Opin. 96.

CASHIER.

Diligence required of, see *Banks and Banking*, § 54.

Liability for dishonesty of teller, see *Evidence*, § 515.

Liability of bank for acts of, see *Banks and Banking*, § 57.

Negligence of, see *Banks and Banking*, § 53.

CATTLE GUARDS.

Duty to construct and maintain, see *Railroads*, § 411.

CAVEAT EMPTOR.

Applicable to judicial sale, see Judicial Sales, § 50.

CEMETERIES.

§ 10. Acquisition of and title to lands.

§ 14.—Abandonment.

§ 18. Tombstones and monuments.

§ 10. Acquisition of and title to lands.
§ 14.—Abandonment.

When a cemetery is abandoned by the corporation owning it, and for a period of more than twenty years no bodies are buried in it, and all its officers and trustees are dead, a court of chancery will not at the instance of one lot holder, whose relatives are buried there, appoint new trustees and decree that such cemetery should be maintained as such, where it is shown that all the bodies except the lot holder's relatives have been removed; but the owner of such lot has a right of property in the lot bought by her of which she can not be deprived.

Whipple v. Louisville Presbyterian Orphan Asylum, 11 Ky. Opin. 159.

§ 18. Tombstones and monuments.

Where one knew a graveyard was on the land when he purchased it, the law, without any reservation and inhibition in the deed, prohibits him from removing the gravestones or injuring and removing the inclosure around the graveyard, and compels him to permit the relatives of those buried there to exercise the right of ingress and egress.

Hutchison v. Akin, 5 Ky. Opin. 373.

CERTAINTY.

In indictment, see Indictment and Information, § 71.

In pleading, see Pleading, § 18.

CERTIFICATE.

Of acknowledgment, see Acknowledgment, §§ 33, 35, 40; Mortgages, § 59.
Of deposit, see Banks and Banking, § 152.

Of election, see Elections, § 264.

Surplusage in certificate of acknowledgment, see Acknowledgment, § 50.

To deposition, see Depositions, §§ 72, 73.

CHALLENGE.

Of juror, see Jury, § 127.

Peremptory challenge, see Jury, § 134.

CHAMPERTY AND MAINTENANCE.

§ 1. Nature and elements in general.

§ 3. Statutory provisions.

§ 4. Champertous contracts in general.

§ 7. Grants of land held adversely.

Action on champertous agreement, see Action, § 13.

Adverse possession within meaning of champerty laws, see Adverse Possession, § 18.

§ 1. Nature and elements in general.

A purchase of land was not champertous because the vendor did not have actual possession of the land at the time the conveyance was made.

Emerine v. Adams, 5 Ky. Opin. 83.

Where a contract, alleged to be champertous, is made while the suit was pending, and on which one trial was had, it is not within the inhibition of the statute.

King v. Boles, 4 Ky. Opin. 147.

§ 3. Statutory provisions.

The statutes of champerty do not apply until the tenant has held adversely to his landlord for fifteen years.

Smith v. Seaton, 1 Ky. Opin. 494.

§ 4. Champertous contracts in general.

A conveyance champertous at the time made is absolutely void, and no change of circumstances will make it available for any purpose or against any person.

Alexander v. Vandyke, 9 Ky. Opin. 747.

§ 7. Grants of land held adversely.

A sale and purchase of land which at the time was in the adverse pos-

session of a third person is void under the act against champerty.

Scott v. Osenton, 7 Ky. Opin. 267.

Where W. purchased land and S. paid the purchase price and built a house thereon, and W., with the consent of S., sold and conveyed the property in payment of a firm debt of W., S. & Co., the deed passed a good title to the purchaser as against S. and his creditors, regardless of the state of the possession.

Small v. Drabell, 7 Ky. Opin. 181.

Where one claiming ownership of real estate sells and conveys the same, and the evidence establishes the fact that one other than the grantee is actually in adverse possession at the time of the sale and conveyance, the sale is void as against the one holding such possession.

Woodford v. Young, 12 Ky. Opin. 109.

CHANGE OF VENUE.

See Criminal Law, V, B; Venue, III. Waiver of irregularity in order for, see Venue, § 77.

CHARACTER.

Evidence of, see Evidence, § 152. Impeachment of, see Witnesses, §§ 333, 338.

CHARGES.

Petition in action to recover excessive freight charges, see Carriers, § 196.

CHARTERS.

Municipal charters, see Municipal Corporations, I, A.

CHARITIES.

I. CREATION, EXISTENCE, AND VALIDITY.

§ 4. Validity of gifts and trusts in general.

§ 7. Character and capacity of beneficiaries.

I. CREATION, EXISTENCE, AND VALIDITY.

§ 4. Validity of gifts and trusts in general.

Where a testator gives a portion of his estate to two named persons to be devoted by them to such benevolent objects and purposes as they may elect, and requesting them in making distribution to give preference to charities connected with or under the control of the Christian Brotherhood, the devise is valid and is not prohibited by statute, such a devise being a conveyance to the benevolent institutions of the Christian Brotherhood.

Given's Admr. v. Shouse, 12 Ky. Opin. 372.

§ 7. Character and capacity of beneficiaries.

Where a trust is created in favor of the Protestant Episcopal church, and its trustees receive conveyance of real estate, a congregation not professing or practising the doctrine, discipline or worship according to the order of that church, can not assert a beneficiary interest in the property.

Merriweather v. Petit, 10 Ky. Opin. 113.

CHATTEL MORTGAGES.

I. REQUISITES AND VALIDITY.

(A) NATURE AND ESSENTIALS OF TRANSFER OF CHATTELS AS SECURITY.

§ 10. Property which may be subject of mortgage.

§ 18.—After-acquired property.

§ 20. Debts or liabilities which may be secured.

§ 22.—Future advances.

§ 27. Parties.

§ 30.—Persons who must join in mortgage.

II. FILING, RECORDING, AND REGISTRATION.

(A) ORIGINAL.

§ 84. Necessity as between parties to instrument.

III. CONSTRUCTION AND OPERATION.

(B) PARTIES AND DEBTS OR LIABILITIES SECURED.

§ 109. Debts secured in general.

(D) LIEN AND PRIORITY.

§ 133. Nature and existence of lien.

§ 138. Priorities of mortgages in general.

IV. RIGHTS AND LIABILITIES OF PARTIES.

§ 163. Use and disposition of property or proceeds.

§ 164.—By mortgagor.

IX. FORECLOSURE.

§ 268. Actions to foreclose.

§ 275.—Parties.

I. REQUISITES AND VALIDITY.

(A) NATURE AND ESSENTIALS OF TRANSFER OF CHATTELS AS SECURITY.

§ 10. Property which may be subject of mortgage.

§ 18.—After-acquired property.

A mortgage on a stock of goods is inoperative as to property acquired and added to the stock after the execution of the mortgage.

Pindell v. Brown, 6 Ky. Opin. 302.

§ 20. Debts or liabilities which may be secured.

§ 22.—Future advances.

A mortgage executed on personal property to secure both present indebtedness and future advancements is valid, and one extending credit to the mortgagor thereafter, is bound to take notice of the contents of such mortgage when the same is of record.

Givens v. Dixon, 10 Ky. Opin. 402.

§ 27. Parties.

§ 30.—Persons who must join in mortgage.

A debtor may legally mortgage his personal property to secure the payment of his debts, and the wife can not prevent him from doing so or retain any rights of exemption by not joining in the mortgage on personal property alone.

Smith v. Wilson & Co., 11 Ky. Opin. 946.

II. FILING, RECORDING, AND REGISTRATION.

(A) ORIGINAL.

§ 84. Necessity as between parties to instrument.

An unrecorded chattel mortgage made in good faith, not with a view to defraud other creditors, is valid be-

tween the parties, and against all purchasers of the chattels described, having notice of the pledge or mortgage, except purchasers from a creditor who had no notice.

Armstrong & Taylor v. Reynolds, 8 Ky. Opin. 169.

III. CONSTRUCTION AND OPERATION.

(B) PARTIES AND DEBTS OR LIABILITIES SECURED.

§ 109. Debts secured in general.

Debts, to secure which a lien has been taken upon other property, can not be presumed to be without a prior mortgage to secure merchandise sold and to be sold.

Berryman v. Brumback & Walker, 7 Ky. Opin. 366.

(D) LIEN AND PRIORITY.

§ 133. Nature and existence of lien.

When all the original stock on which the mortgage was given had been sold, the lien created by the mortgage is gone, as the stock purchased after the mortgage was not subject to it, because a man can not legally sell or convey property to which he has no title.

Lucas v. Temple & Barker, 1 Ky. Opin. 259.

§ 138. Priorities of mortgages in general.

Before a mortgagee of personal property can be adjudged to have priority over another lienholder he must show that his mortgage embraces the property upon which the other lienholder holds a claim.

Hoe & Co. v. Bullock, 10 Ky. Opin. 724.

IV. RIGHTS AND LIABILITIES OF PARTIES.

§ 163. Use and disposition of property or proceeds.

§ 164.—By mortgagor.

The removal, concealment or sale of mortgaged chattels gives the mortgagee a right of attachment only when the removal, sale or concealment endangers his ultimate security; and he is not entitled to an attachment when

enough property remains to amply secure him.

Sutton v. Hancock, 8 Ky. Opin. 359.

IX. FORECLOSURE.

§ 268. Actions to foreclose.

Where the records in the lower court show that the hirer of personal property was not made a party to a foreclosure of a mortgage on same, he can not plead the record and judgment in bar to a recovery in the circuit court.

Worthington v. Green, 4 Ky. Opin. 520.

§ 275.—Parties.

In a suit to foreclose a chattel mortgage, one who sold the property to satisfy a debt owing by the mortgagor is not a necessary party.

Foulks v. Ritter, 6 Ky. Opin. 233.

CHECKS.

See Bills and Notes.

Payment by, see Payment, § 20.

CHILDREN.

See Descent and Distribution, § 26; Infants.

Confirmation of defective sales of infant's real estate, see Infants, § 32.

Custody and control of, see Parent and Child, § 2.

Custody and support of, see Divorce, VI.

Custody of, see Husband and Wife, § 299½.

Duty of step-father to support step-child, see Parent and Child, §§ 3, 14.

Duty to support and educate, see Parent and Child, § 3.

Homestead rights, see Homestead, § 142.

Jurisdiction over poor children, see Courts, § 182.

Reimbursement out of estate for support, see Parent and Child, § 3.

Use of word in will does not ordinarily include grandchildren, see Wills, § 497.

When word of purchase, see Deeds, § 123.

CHOSSES IN ACTION.

Fraudulent conveyances of, see Fraudulent Conveyances, § 48.

CIRCUIT COURT.

Transfer of cause from circuit court to county court by agreement of parties, see Courts, § 26.

Appeal from to Court of Appeals, see Appeal, § 26.

Exclusive jurisdiction of, see Courts, § 183.

Jurisdiction as to lands not embraced in petition, see Courts, § 118.

Jurisdiction of, see Courts, § 3.

Transfer of cause by agreement from quarterly court, see Courts, § 22.

CIRCUMSTANTIAL EVIDENCE.

Of conspiracy, see Conspiracy, § 45.

Of malice, see Assault and Battery, § 84.

Weight of, see Criminal Law, § 552.

CITIZENS.

§ 13. Expatriation.

A legislative act can not make voluntary rebellion involuntary expatriation.

Burkett v. McCarty, 1 Ky. Opin. 100.

The act known as the "Expatriation Act," approved March 16, 1862, was unconstitutional.

Burkett v. McCarty, 1 Ky. Opin. 100.

A citizen may, with the consent of his state, express or presumed, expatriate himself, but no mere act of state legislation can per se denationalize him without his concurrence.

Burkett v. McCarty, 1 Ky. Opin. 100.

Expatriation because of commission of certain acts is a punishment which can not be inflicted without judicial conviction of some crime or act denounced by legislation as a forfeiture of citizenship, any more than a bill of attainder without judicial conviction.

tion can constitutionally punish a citizen.

Burkett v. McCarty, 1 Ky. Opin. 100.

CITY ATTORNEY.

Duties of, see Municipal Corporations, § 166.

CITY COUNCIL.

Journals of, see Municipal Corporations, §§ 99, 109.

CIVIL RIGHTS.

§ 9. Discrimination as to public school privileges.

An act is not unconstitutional because it provides that a fund to be raised by taxation is to be used to furnish school facilities to white children only; nor will an act be declared unconstitutional because the court merely doubts legislative power.

Miller v. Gosnell, 9 Ky. Opin. 322.

Where it is shown that the colored children of Louisville have been fully provided with school facilities by a general tax on all taxable property, a similar tax for a similar purpose for white children is not an unconstitutional discrimination in their favor.

Miller v. Gosnell, 9 Ky. Opin. 322.

CLAIM AND DELIVERY.

See Replevin.

CLAIMS.

Against decedent's estate, see Executors and Administrators, VI.

Against United States Government, see United States, IV.

Allowance of, see Executors and Administrators, § 227.

Barred by limitation, see Executors and Administrators, § 213.

By third person, see Attachment, § 280; Execution, VI.

Demand, when necessary, see Executors and Administrators, § 222.

Disputed claims, see Executors and Administrators, § 252.

Liability on claimant's bond, see Execution, § 206.

Manner of presentation in action by administrator, see Executors and Administrators, § 222.

Of creditors, see Assignments for Benefit of Creditors, V, B.

Of executors or administrators, see Executors and Administrators, § 219.

Of third persons, see Attachment, §§ 294, 295; Execution, VI.

Presentation and filing, see Executors and Administrators, § 228.

Presumption as to, after five years, see Executors and Administrators, § 213.

Proceedings by claimant of property levied on, see Execution, § 184.

Priority of, see Executors and Administrators, § 263.

Proof of claims in bankruptcy, see Bankruptcy, §§ 307, 314.

Purging of usury, see Usury, § 88.

Verification of, see Executors and Administrators, § 227.

Waiver of compliance with statute, see Executors and Administrators, § 227.

When should not be rejected, see Executors and Administrators, § 504.

CLERICAL ERROR.

Correction by motion, see Appeal, § 73.

CLERKS OF COURTS.

§ 10. Compensation and fees of clerks of state courts.

§ 37.—Recovery of fees or salary.

§ 64. Powers and proceedings in general.

§ 69. Custody and care of records.

§ 73. Liabilities on official bonds.

Authority to execute supersedeas, see Supersedeas, § 4.

Oath of office, see Officers, § 36.

Taking bail bond, see Bail, § 54.

Taxation of costs by clerk of Court of Appeals, see Costs, § 151.

When deposit of money with clerk does not constitute payment, see Payment, § 3.

§ 10. Compensation and fees of clerks of state courts.

Where a record is much confused by the interlineation of the orders out of their proper place, and without any regard to the order in which the pro-

ceedings were had, the clerk is not entitled to charge any fee therefor.

Seidon v. Bullitt, 5 Ky. Opin. 129.

It is the duty of the circuit clerk to make original indexes to his records, and he can not legally demand pay therefor.

McCoy v. Corum, 3 Ky. Opin. 366.

Where neither the law nor court requires or authorizes the clerk of the court to make a cross-index, the clerk has no legal claim for compensation therefor either on the state or county.

McCoy v. Corum, 3 Ky. Opin. 366.

§ 37.—Recovery of fees or salary.

The county court is a judicial tribunal, and when upon a claim filed for services by the clerk such a claim is allowed, it is a final adjudication, and, in the absence of fraud or mistake, can not be renewed by the chancellor on account of an alleged mistake of law made by the county court.

Boone County v. Dils, 12 Ky. Opin. 482.

§ 64. Powers and proceedings in general.

The clerk of a court should not be permitted to stultify himself by swearing that he failed to perform his duty, and will not be permitted to do so if there is any evidence to the contrary.

Thomas v. Bennett's Heirs, 7 Ky. Opin. 458.

§ 69. Custody and care of records.

Where the certificate of a clerk is more minute than necessary, but it can not be inferred therefrom that any portion of the record is omitted, if there is a diminution of the record, appellee must be deemed to have supplied it by the proper writ.

Martin v. Morgan, Admr., 3 Ky. Opin. 63.

§ 73. Liabilities on official bonds.

In an action by the state against the clerk of the county court for money collected as taxes, it is no defense to the action that a suit is pending between defendant and the trustees of the jury fund to whom the money collected is payable, and that the state should wait until the termination of such suit.

Johnson v. Commonwealth, 6 Ky. Opin. 449.

Where a judgment is entered and plaintiff's attorney made, in the memorandum book kept by the clerk for such purposes, a direction to the clerk to issue an execution, and he fails to do so, and as a result the plaintiff is unable to collect his judgment, the clerk becomes liable for such loss and he and his sureties are liable therefor.

Burton v. McFarland, 11 Ky. Opin. 428.

Where money comes to the hands of the clerk of the court by consent of parties, but not under the order of the court and not as an officer, his sureties are not liable on account thereof, but the clerk is individually liable.

Snape v. Sanford's Receiver, 11 Ky. Opin. 609.

CLIENT.

See Attorney and Client.

Duty of, see Attorney and Client, § 105.

Negligence of, see Attorney and Client, § 105.

COERCION.

Preventing operation of estoppel, see Estoppel, § 94.

COLLATERAL ATTACK.

See Judgment, XI.

Of judgment, see Judgment, § 501.

Of probate of will, see Wills, § 420.

Of sale of ward's real estate by guardian, see Guardian and Ward, § 107.

COLLATERAL SECURITY.

See Pledges.

Diligence required of pledgee, see Pledges, § 30.

Effect of suretyship, see Principal and Surety, § 109.

Surety entitled to benefit of, see Principal and Surety, § 194.

COLLECTING AGENT.

Attorney's fees and costs, see Principal and Agent, § 64.

COLLECTIONS.

Appointment and qualification of tax collector, see Taxation, §§ 546, 547, 550.

Authority of agent to collect for principal, see Principal and Agent, § 64.

Liability for money collected, see Attorney and Client, § 116.

COLLEGES AND UNIVERSITIES.

§ 6. Property and funds.

§ 11. Dissolution.

§ 6. Property and funds.

Where, by the act of the Legislature, authorizing the removal of a university from one county to another, and requiring the refunding of stock subscriptions to original subscribers in the county where the university was first located, "the amount of tuition unpaid to them," as provided in their stock, where one of the subscribers had removed from the county before the passage of said act, he would not be entitled to the benefits thereof.

Stagg v. Kentucky University, 3 Ky. Opin. 451.

On an allegation that upon the subscriptions for stock in a university, he was entitled to tuition therefor, before an action will lie, it must be shown that the university refused to permit him to send pupils thereto as prescribed in the certificate.

Stagg v. Kentucky University, 3 Ky. Opin. 451.

The act of the Legislature, approved February 17, 1866, entitled "an act concerning Allen County Seminary" is void, in that it authorizes the sequestration and distribution of the proceeds of the seminary lands not contemplated by the donors thereof.

Meng v. Alexander, 3 Ky. Opin. 520.

Where an action was brought by appellees, citizens of Mercer county, holders by assignment of a certificate of stock for the permanent endowment of Bacon College, against appellant to compel payment of the attached coupons, and certificates of

stock, for subscriptions to Bacon College, were issued to citizens of Mercer county, and afterwards by an act of the Legislature, said college was consolidated and removed to Fayette county, and providing a refund to the citizens of Mercer county the nominal value of unpaid coupons, and all scholarships subscribed; as the certificates are transferable on their face, the citizens of Mercer county holding same, were entitled to collect same in money instead of tuition benefits.

Kentucky University v. Woods, 3 Ky. Opin. 639.

The right conferred upon assignor of stock in a college, to collect subscriptions, is conferred upon the assignee of the stock.

Kentucky University v. Woods, 3 Ky. Opin. 639.

A private corporation engaged in conducting a college like an individual is not exempt from the payment of its debts incurred in the conduct of its school, and there is no public policy which forbids the sale of its property to pay its indebtedness.

Hart v. Trustees of Princeton College, 10 Ky. Opin. 233.

§ 11. Dissolution.

The Legislature has no power to dissolve an educational corporation, created and in existence for a number of years, and order an appropriation of the property different from that for which it was created.

Meng v. Alexander, 3 Ky. Opin. 520.

The "reserving" of lands in a town, and used for some fifty years for school purposes, will not invest the trustee of the school with title that may be disposed of on dissolution of the incorporated school, since when dissolved the land would revert back to the donors.

Meng v. Alexander, 3 Ky. Opin. 520.

COLOR OF TITLE.

Possession under, see Adverse Possession, §§ 68, 98.

COMMENCEMENT.

Of action, see Action, § 64.

COMMISSION.

For collection of assets, see Executors and Administrators, § 495.

COMMISSION MERCHANT.

Duty of, see Principal and Agent, § 48.
Liability for negligence in selling, see Principal and Agent, § 79.

COMMISSIONER IN CHANCERY.

Sales by, see Judicial Sales, § 1.

COMMISSIONERS.

Correction of errors in commissioner's report, see Appeal, § 248.

COMMITTEE.

Authority of committee of insane person, see Insane Persons, § 40.
Liability on bond, see Insane Persons, § 45.

COMMON CARRIERS.

Nature of liability, see Carriers, § 108.

COMMON COUNCIL.

Proceedings by, see Municipal Corporations, IV.

COMMON LAW.

Arbitration at, see Arbitration and Award, § 1.
As to arrest and trial of persons guilty of riot, see Arrest, § 3.
Bonds, see Bonds, § 50.
Jurisdiction of common-law obligations, see Bonds, § 121.
Relating to arbitration and award, see Arbitration and Award, § 82.
Requisites of common-law marriage, see Marriage, § 13.

COMPENSATION.

See Contracts, II, F; Eminent Domain, II; Salvage, I.
For improvements on real estate, see Improvements, § 4.
For property taken for public use, see Eminent Domain, II.
For services by partner, see Partnership, § 83.
For services rendered, see Work and Labor.
Inadequate or excessive compensation, see Eminent Domain, § 150.
Medium of payment, see Contracts, § 308.
Of administrator, see Executors and Administrators, §§ 488, 492, 495, 496.
Of attorney, see Attorney and Client, IV, A.
Of broker, see Brokers, IV.
Of clerk of court, see Clerks of Courts, § 10.
Of contractor, see Contracts, II, F.
Of county attorney, see District and Prosecuting Attorneys, § 4.
Of court commissioners, see Court Commissioners, § 2.
Of employee, see Master and Servant, § 72.
Of executors and administrators, see Executors and Administrators, XI, D.
Of guardian, see Guardian and Ward, § 149.
Of juror, see Jury, § 77.
Of municipal officers, see Municipal Corporations, § 161.
Of prison guards, see Prisons, § 8.
Of sheriff, see Sheriffs and Constables, § 28.
Of witnesses, see Witnesses, § 23.
Reasonable compensation of attorney, see Attorney and Client, §§ 130, 167.

COMPROMISE AND SETTLEMENT.

- § 1. Nature and requisites.
- § 5.—Making and form of agreement.
- § 6.—Consideration.
- § 7. Validity.
- § 10. Construction of agreement.
- § 11.—In general.
- § 14. Operation and effect.
- § 17.—Conclusiveness.
- § 19. Impeachment or setting aside.
- § 23. Evidence.

Authority of attorney to compromise claim for client, see Attorney and Client, § 101.

Authority of attorney to compromise suit, see Attorney and Client, § 77.
Compromise by agent, see Principal and Agent, § 111.

Compromise boundary line, see Boundaries, § 49.

Consideration of compromise agreement, see Bills and Notes, § 92, Contracts, § 68.

Enforcement of compromise agreements as to boundary lines, see Boundaries, § 49.

Evidence of attempted compromise, see Evidence, § 213.

For personal injuries, see Street Railroads, § 16.

Offer of compromise not admissible in evidence, see Evidence, § 212.

Settlement of partnership, see Partnership, § 297.

§ 1. Nature and requisites.

§ 5.—Making and form of agreement.

Where persons meet and attempt to settle an account between them, but disagree before the whole account is gone over, and all efforts at a final settlement are broken off, such attempt does not amount to settlement even of that part of the account gone over before disagreement.

McKee v. McKee, 9 Ky. Opin. 805.

§ 6.—Consideration.

The agreement between an insolvent debtor and his creditors, that they will not carry his estate into bankruptcy, on condition that the debtor would pay a cash per cent of his debts, has a sufficient consideration for its support.

Pierce v. Matthews, 10 Ky. Opin. 397.

§ 7. Validity.

Where a compromise is made with full knowledge of the facts, free from fraud, and with knowledge of their legal rights, it can not be avoided.

Kendall v. Kendall's Exr., 7 Ky. Opin. 592.

Where the testimony shows that a plaintiff was not in actual danger of violence, or made an assignment of a note through intimidation or fear, he

cannot recover the property so given in settlement of a suit.

Williams v. Lams, 3 Ky. Opin. 695.

Where parties have conflicting claims to land and a lawsuit is likely to arise to test the superiority of the one or the other, to avoid that conflict, the parties may enter into an agreement to compromise, and should one of the parties by mistake of law arising on the facts be induced to enter into the compromise, such mistake is not a cause to set aside the compromise, nor will the court undertake, in such a case, to investigate the merits of the claim or to determine whether it was of sufficient importance to form a consideration for a compromise.

Bruner v. Berry, 5 Ky. Opin. 158.

The question as to whether or not the writing purporting to compromise the action was executed under such circumstances as to render it of no binding force was properly submitted to the jury.

Hart v. Smithson, 5 Ky. Opin. 470.

§ 10. Construction of agreement.

§ 11.—In general.

In the compromise and settlement of a claim for a less amount than is due, the utmost good faith must characterize the transaction, and such good faith is not to be inferred in favor of the debtor.

Gage v. Wright, 7 Ky. Opin. 734.

In construing a contract made by some of the legatees with others engaged in contesting the will, whereby they agree to pay such contestants several thousand dollars to cease contesting, the surrounding circumstances must be looked to in order to arrive at the intention of the parties as to whether the compromise money was to be paid out of the estate or by the individuals making the promise.

Gaither v. Bland, 13 Ky. Opin. 879.

§ 14. Operation and effect.

The compromise of a litigation is binding on the parties, unless it was procured by fraud.

Mitchell & Barbee v. Shannon, 7 Ky. Opin. 207.

A matter in litigation is a proper subject of compromise.

Woodson v. Ballinger, 7 Ky. Opin. 101.

One not a surety, against whom a claim of \$16,000 is made jointly with others, who purchases his peace by way of compromise for a less amount, and who receives certain collaterals from others liable on such original claim, can not be permitted to hold the same and pay himself out of them at the expense of the rightful owner.

Shelby's Exrs. v. Shelby, 9 Ky. Opin. 722.

§ 17.—Conclusiveness.

Where a creditor by his voluntary act accepts a sum less than the amount of his claim under an agreement of creditors, in full satisfaction of his debt, he can not make an additional collection on the claim, unless it is shown that the debtor fraudulently procured the creditor to accept the lesser sum in satisfaction of his claim.

Bank of Kentucky v. Poyntz, 11 Ky. Opin. 99.

§ 19. Impeachment or setting aside.

A settlement can not be avoided by a party because of his ignorance of a witness who could testify to the facts upon which he seeks to set aside the settlement, where the exercise of the slightest diligence would have enabled the party to have known of such witness and the testimony he could give, prior to the making of the settlement.

Kendall v. Kendall's Exr., 7 Ky. Opin. 592.

A compromise between litigants will not be set aside, where not induced by fraud, simply because one of the parties discovers thereafter that he could have proven certain facts of which at the time of the compromise he had no knowledge.

Savings Institution of Harrodsburg v. Johnson, 8 Ky. Opin. 489.

Where, in an action to set aside a compromise and secure the return of money paid on account thereof, it is shown that a person was induced to enter into such a compromise agreement and pay money thereon by reason of fraudulent representations and

threats, she is entitled to recover such money and have such agreement set aside.

Holt v. Miller, 9 Ky. Opin. 226.

§ 23. Evidence.

Where the claim might have been included in a settlement between the parties, made several years prior to its assertion, and it was not asserted until after a judgment had been rendered against the guardian on the settlement note, it will be presumed that all matters between the parties were included in the settlement.

Donovan v. Bradford, 6 Ky. Opin. 538.

Where the theory of plaintiffs is that the defendant, by false statements, induced them to make a settlement, but that is denied by the reply to the counterclaim, the burden is on plaintiffs to establish the fraud.

Mitchell & Barbee v. Shannon, 7 Ky. Opin. 207.

COMPUTATION.

Mode of computing interest, see Interest, § 56.

CONCEALMENT.

As ground for attachment, see Attachment, § 28.

CONCLUSIONS.

Of pleader, see Pleading, §§ 8, 147.

CONDEMNATION.

See Eminent Domain.

CONDITION.

See Contracts, II, E.

Conditional payment, see Payment, § 33.

Construction and operation of, see Deeds, § 152.

Conveyance upon condition of support of grantor, see Vendor and Purchaser, § 79.

Imposed by will, see Wills, §§ 655, 659.

Of bail bond, see Bail, § 68.
 Of license to sell intoxicating liquors, see Intoxicating Liquors, § 79.
 Of subscription, see Subscriptions, § 15.
 On granting continuance, see Continuance, § 49.
 Precedent, see Contracts, § 221.
 Precedent to action for breach of executory contract, see Sales, § 345.
 Precedent to action for cancellation of instruments, see Cancellation of Instruments, § 19.
 Precedent to action of replevin, see Replevin, § 10½.
 Precedent to action on sheriff's bond, see Sheriffs and Constables, § 129.
 Precedent to cancellation of mortgage, see Cancellation of Instruments, § 21.
 Precedent to creditors' suit, see Creditors' suit, § 9.
 Precedent to enforcement of judgment in court of equity, see Judgment, § 904.
 Precedent to enforcement of vendor's lien, see Vendor and Purchaser, § 273.
 Precedent to rescission of contract, see Contracts, § 263.
 Precedent to right of action, see Action, I.
 Precedent to suit against administrator, see Executors and Administrators, § 431.
 Precedent to suit to set aside conveyance, see Fraudulent Conveyances, §§ 241, 259.

CONDITIONAL FEE.

See Deeds, § 126.
 Wills, § 603.

CONDITIONAL SALE.

See Sales, IX.
 Distinguished from mortgage, see Mortgages, § 6.

CONDONATION.

Acts constituting, see Divorce, § 49.

CONFESSION.

See Evidence, VII.
 Admissibility of, see Criminal Law, X, K.

As evidence, see Criminal Law, § 406.
 Conviction on, see Burglary, § 41.
 Of cross petition, see Pleading, § 178.
 Of set-off, see Pleading, § 182.
 Weight as evidence, see Criminal Law, § 554.

CONFIDENTIAL RELATIONS.

See Fiduciary Relations; Witnesses, II, D.

CONFIRMATION.

Conclusiveness of order confirming judicial sale, see Judicial Sales, § 31.
 Of sale, see Judicial Sales, § 31.
 Of sale by guardian, see Guardian and Ward, § 103.
 Of sale of infants' real estate, see Infants, § 41.
 Of sale of ward's real estate by guardian, see Guardian and Ward, § 103.

CONFISCATION.

Exorbitant assessment, see Municipal Corporations, § 562.
 Power to enforce town ordinance, see Municipal Corporations, § 57.

CONFLICT OF LAWS.

See Bills and Notes, § 2; Contracts, § 2; Limitation of Actions, § 2.
 Mortgage executed in other states on lands in this state, see Contracts, § 2.

CONGRESS.

Control over contracts, see Contracts, § 50.

CONSENT.

Of husband to conveyance by wife, see Husband and Wife, § 184.
 Of wife to judicial sale of husband's lands, see Dower, § 46.
 To alteration of note, see Alteration of Instruments, § 12.

CONSIDERATION.

See Bills and Notes, I, E; Contracts, I, D; Fraudulent Conveyances, I, E. Vendor and Purchaser, § 12.

Acknowledgment and receipt of, see Deeds, § 35.

Agreement to give land to relative for, see Vendor and Purchaser, § 12.

Burden of proof under plea of no consideration, see Bills and Notes, § 499.

Composition with creditors, see Compromise and Settlement, § 6.

Conveyance in fraud of creditors, see Fraudulent Conveyances, § 73.

Estoppel to deny, see Bills and Notes, § 98.

Estoppel to impeach original consideration of note, see Bills and Notes, § 98.

Failure of, see Auctions and Auctioneers, § 8; Bills and Notes, § 97.

For assignment, see Assignments, § 53.

For Compromise, see Contracts, § 68.

For conveyance by husband and wife, see Husband and Wife, § 29.

For part payment of debt, see Payment, § 33.

For promise to pay claim discharged in bankruptcy proceeding, see Contracts, § 54.

For notes, see Vendor and Purchaser, § 302.

For subscription, see Subscriptions, § 5.

For voluntary conveyance by husband to wife, see Husband and Wife, § 46.

Legality of object of, see Bills and Notes, § 106.

Love and affection, see Deeds, § 17.

Note for purchase-price without consideration, see Bills and Notes, § 97.

Of compromise agreement, see Bills and Notes, § 92.

Of contracts, see Contracts, I, D.

Of notes executed by directors of corporation, see Corporations, § 463.

Parol evidence of, see Bills and Notes, § 499; Deeds, §§ 14, 202; Evidence, § 419.

Release of dower under promise to convey to wife, see Husband and Wife, § 47.

Sufficiency of, see Banks and Banking, § 189; Bills and Notes, §§ 91, 92, 95.

Want of consideration, see Deeds, § 19.

CONSOLIDATION.

Actions which may be consolidated, see Action, 57.

Of actions, see Action, § 54.

Of causes of action, see Action, §§ 39, 55, 59.

Trying cases together, see Action, § 59.

CONSPIRACY.**I. CIVIL LIABILITY.****(A) ACTS CONSTITUTING CONSPIRACY AND LIABILITY THEREFOR.**

§ 8. Conspiracy to injure property or business.

12. Persons liable.

(B) ACTIONS.

§ 18. Pleading.

II. CRIMINAL RESPONSIBILITY.**(A) OFFENSES.**

§ 28. Conspiracy to commit crime.

§ 39. Persons liable.

(B) PROSECUTION AND PUNISHMENT.

§ 43. Indictment or information.

§ 44. Evidence.

§ 45—Admissibility in general.

Competency of conspirators to testify for and against each other, see Witnesses, § 88.

To defraud not presumed, see Fraudulent Conveyances, § 165.

I. CIVIL LIABILITY.**(A) ACTS CONSTITUTING CONSPIRACY AND LIABILITY THEREFOR.**

§ 8. Conspiracy to injure property or business.

The legal principle governing in cases where several are connected in an unlawful enterprise, when the connection is established by the evidence, is that every act and declaration of each one in furtherance of the original enterprise, and with reference to the common object is, in contemplation of law, the act and declaration of all.

West v. Mason, 2 Ky. Opin. 316.

§ 12. Persons liable.

To render a defendant liable for the conduct of others in an action for the wrongful taking of property, it must

be shown that there was an active participation in the taking, or that he advised and counseled therein.

Thompson v. Reed, 2 Ky. Opin. 508.

(B) ACTIONS.

§ 18. Pleading.

A petition which alleges the unlawful seizure and removal or conversion of property of the plaintiff by Confederate soldiers, and that the defendants, citizens of the county, were at the time aiding, inciting and advising the same, and that they directly and indirectly participated in said seizure and removal of the property and aided therein, constitutes a valid cause of action, and is not demurrable.

Scale v. Chambers, 2 Ky. Opin. 201.

II. CRIMINAL RESPONSIBILITY.

(A) OFFENSES.

§ 28. Conspiracy to commit crime.

Where there is no proof of a conspiracy in a homicide case, it is error for the court to give any instruction as to the law of conspiracy.

Sparks v. Commonwealth, 13 Ky. Opin. 484.

§ 39. Persons liable.

If two or more persons act pursuant to an understanding between them to accomplish a common design to shoot, or even to engage in a rencounter with another, each is responsible for what the other did in furtherance of the common object.

Sapp v. Commonwealth, 9 Ky. Opin. 2.

(B) PROSECUTION AND PUNISHMENT.

§ 43. Indictment or information.

An indictment is not sufficient which charges that defendants confederated together for the purpose of alarming and intimidating one at his own house, and cut and injured his dog. It is not enough that the prosecuting witness was alarmed or intimidated by the injury inflicted on the dog; it must appear that he was alarmed and intimi-

dated by the defendants, and further that they went to his house, not to injure the dog, but to alarm and intimidate him.

Mirdle v. Commonwealth, 10 Ky. Opin. 500.

An indictment for conspiracy is insufficient when it charges the conspiracy but fails to allege what the object of the conspiracy was.

Mathis v. Commonwealth, 11 Ky. Opin. 686.

§ 44. Evidence.

§ 45.—Admissibility in general.

One person indicted, charged with conspiring with another and committing murder, is a competent witness for the other if the indictment is a good indictment for conspiracy.

Mathis v. Commonwealth, 11 Ky. Opin. 686.

An indictment is not competent evidence in a charge of criminal conspiracy, and its being read to the jury as evidence over the objection of defendant is reversible error.

Mace v. Commonwealth, 12 Ky. Opin. 490.

Conspiracy to commit crime can rarely be proven by direct or positive evidence, and it can usually only be shown by slight circumstances which, woven together, make a complete whole.

Davis v. Commonwealth, 13 Ky. Opin. 329.

The declaration of a co-conspirator made after the killing in a murder case, not a part of the transaction, and made after the aim of the conspiracy has been accomplished, is not admissible as evidence against other conspirators.

Cloud v. Commonwealth, 13 Ky. Opin. 1092.

CONSTABLES.

Liability on official bond, see Sheriffs and Constables IV.

CONSTITUTIONAL LAW.

I. ESTABLISHMENT AND AMENDMENT OF CONSTITUTIONS.

§ 10. Amendment of Constitution of United States.

II. CONSTRUCTION, OPERATION AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

§ 11. General rules of construction.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(A) LEGISLATIVE POWERS AND DELEGATIONS THEREOF.

§ 50. Nature and scope in general.

§ 59. Delegation of powers.

§ 61.—To judiciary.

VII. OBLIGATION OF CONTRACTS.

(A) POWERS OF STATES IN GENERAL.

§ 114. Laws impairing the obligation.

§ 115.—In general.

(C) CONTRACTS OF INDIVIDUALS AND PRIVATE CORPORATIONS.

§ 145. Nature of contracts protected in general.

XI. DUE PROCESS OF LAW.

§ 278. Deprivation of property in general.

See Civil Rights; Statutes.

Change in construction of statutes affecting property right, see Courts, § 93.

Confiscation by exorbitant assessments, see Municipal Corporations, § 562.

Constitutional requirements and restrictions as to taxation, see Taxation, II.

Impairment of contracts, see Contracts, § 50.

Payment for property taken under eminent domain, see Eminent Domain, § 73.

I. ESTABLISHMENT AND AMENDMENT OF CONSTITUTIONS.

§ 10. Amendment of Constitution of United States.

Where an amendment to the Constitution of the United States has not been ratified by the required number of states, its provisions can have no bearing on matters arising during its process of ratification.

Maddox v. Watson's Admr., 4 Ky. Opin. 519.

II. CONSTRUCTION, OPERATION AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

§ 11. General rules of construction.

The provisions of the Constitution should receive a liberal and not a technical construction, and no provision of a statute, relating to the subject expressed in the title of an act having a natural connection therewith, and not foreign to the same, should be deemed within the constitutional inhibition (§ 27, Art. 2).

Commonwealth v. City of Frankfort, 9 Ky. Opin. 829.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(A) LEGISLATIVE POWERS AND DELEGATIONS THEREOF.

§ 50. Nature and scope in general.

The legislature has undoubted right to make provisions as to the funds and revenues of a municipal corporation; its power to regulate taxes being supreme, provided it keeps within constitutional limits, and it had the right to authorize a precinct to compromise and settle its debt.

Arkenburgh v. Hudson, 13 Ky. Opin. 885.

§ 59. Delegation of powers.

§ 61.—To judiciary.

An act purporting to vest in the county court of a county power to prescribe the fees of the sealer of weights and measures is unconstitutional, and such fees paid to such officer may be recovered back; and the power to prescribe such fees is a legislative power, and under our Constitution can not be delegated by the general assembly to the county court.

Bridgeford & Co. v. Newman, 10 Ky. Opin. 950.

VII. OBLIGATION OF CONTRACTS.

(A) POWERS OF STATES IN GENERAL.

§ 114. Laws impairing the obligation.

§ 115.—In general.

An act of the legislature approved

January 31, 1870 (Acts 1869-70, p. 205, ch. 220), for the benefit of the Bryant Station and Lexington Tpk. Co., was a mere gratuity, possessing none of the elements of a contract binding upon the state, but conferring on the company an exclusive privilege not possessed by other companies, and consequently the legislature had the right thereafter to repeal such act and leave the company to operate under the general laws.

Bryant Station & L. Tpk. Co. v. Johnston, 11 Ky. Opin. 427.

(C) CONTRACTS OF INDIVIDUALS AND PRIVATE CORPORATIONS.

§ 145. Nature of contracts protected in general.

It is not deemed absolute, arbitrary power to compel a debtor to pay what he owes, however efficient or speedy the remedy may be, these being considered as sustaining the obligation of the contract.

Beazley v. Mershon, 3 Ky. Opin. 21.

XI. DUE PROCESS OF LAW.

§ 278. Deprivation of property in general.

Though a defendant has taken up arms against his government he could not be deprived of his property until there was a judgment of forfeiture by a court of competent jurisdiction.

Thornsbury v. Chaney, 2 Ky. Opin. 80.

All delays after debts are due are regarded as matters of grace on the part of the creditor or the government, especially when regulated by law.

Beazley v. Mershon, 3 Ky. Opin. 21.

To take from a citizen his property without just compensation paid or to be paid, may be justly denounced as absolute, arbitrary power, within the constitutional meaning, but not so where he is merely compelled by legal process to pay out of his property moneys he may owe to others.

Beazley v. Mershon, 3 Ky. Opin. 21.

Where money was collected by a sheriff under a void subscription to stock of a turnpike company by a county court, the Legislature can not, by legalizing the subscription, authorize the payment of the money thus collected and held by the sheriff to the discharge of such subscription, since such action would be violative of the Bill of Rights providing "that no man's property shall be taken or applied to a public use without the consent of his heirs and without the just compensation."

Potts v. Carlisle & Jackson, Tpk. Co., 6 Ky. Opin. 503.

CONSTRUCTION.

See Bills and Notes, II; Bonds, II; Larceny, § 69.

Bill of sale, see Sales, § 149.

By parties to contract, see Contracts, § 170.

Contract for sale of real estate, see Vendor and Purchaser, II.

Contract for guaranty, see Guaranty, § 27.

Contract of insurance, see Insurance, V, B.

Evidence in aid of, see Contracts, § 175; Mortgages, § 109.

Of assignment for creditors, see Assignments for Benefit of Creditors, II.

Of assignment of lease, see Landlord and Tenant, § 79.

Of bills and notes, see Bills and Notes, II.

Of chattel mortgages, see Chattel Mortgages, § 3.

Of compromise agreement, see Compromise and Settlement, § 11.

Of contract of sale, see Sales, II.

Of contracts, see Contracts, II.

Of Constitution, see Constitutional Law, II.

Of corporate charter, see Corporations, § 372.

Of covenants, see Covenants, II.

Of decree for divorce, see Divorce, § 169.

Of deeds, see Deeds, §§ 90, 93.

Of exemption laws, see Exemptions, §§ 4, 106.

Of instructions, see Criminal Law, § 822.

Of judgment, see Judgment, XII.

Of land patent, see Public Lands, § 114.

Of leases, see Landlord and Tenant, II, B, § 322.

Of mining lease, see Mines and Minerals, § 61.

Of mortgages, see Mortgages, III.

Of oil lease, see Mines and Minerals, § 72.

Of pleading, see Pleading, § 34.

Of slanderous words, see Libel and Slander, § 19.

Of statute of limitations, see Limitation of Actions, § 5.

Of statutes, see Statutes, VI.

Of testamentary trusts, see Wills, § 679.

Of trust agreement, see Trusts, II.

Of will, see Wills, § 614.

Of wills—Extraneous evidence, see Wills, § 485.

Special contract of shipment, see Carriers, § 63.

CONSTRUCTIVE ASSIGNMENT.

For benefit of creditors, see Assignments for Benefit of Creditors, § 10.

CONSTRUCTIVE NOTICE.

See Notice.

Agreement of record in another county, see Notice, § 4.

Definition, see Notice, § 4.

Of amendment of pleading, see Pleading, § 236.

Of dissolution of partnership, see Partnership, § 288.

Records of deed, see Deeds, § 79.

CONTEMPT.

I. ACTS OR CONDUCT CONSTITUTING CONTEMPT OF COURT.

§ 19. Disobedience to mandate, order, or judgment.

§ 20.—In general.

§ 25.—Refusal to pay money as adjudged.

II. POWER TO PUNISH AND PROCEEDINGS THEREFOR.

§ 51. Summary proceedings.

§ 53.—Contempts not in presence of court.

I. ACTS OR CONDUCT CONSTITUTING CONTEMPT OF COURT.

§ 19. Disobedience to mandate, order or judgment.

§ 20.—In general.

Where a litigant persistently failed and refused to execute a bond required until the final determination of the action, or to deposit the amount of a sale bond, the court may order him to pay into court forthwith the amount of the sale bond, interests and costs, and may order him to be committed in default of payment.

Greer v. Mechanics' Mutual Sav. Assn. of Newport, 11 Ky. Opin. 439.

The chancellor does not commit reversible error by refusing to punish one for a contempt committed by an alleged obstruction of a passway which the chancellor had prior thereto ordered opened, since it was for the chancellor to say whether the erection of the gate across the passway amounted to an obstruction.

Urton v. Downey, 11 Ky. Opin. 564.

§ 25.—Refusal to pay money as adjudged.

The mere failure to satisfy an execution or judgment when the defendant is unable to do so should not be treated as a contempt and punished accordingly.

Lowe v. Thornton's Heirs, 1 Ky. Opin. 8.

II. POWER TO PUNISH AND PROCEEDINGS THEREFOR.

§ 53.—Contempt not in presence of court.

The party should be summoned on a rule to appear and defend or excuse the supposed contempt before the court should resort to an attachment.

Lowe v. Thornton's Heirs, 1 Ky. Opin. 8.

CONTEST.

Of election, see Elections, X.

CONTINUANCE.

§ 7. Discretion of court.

§ 8. Successive applications.

- § 14. Amendment of pleadings.
- § 19. Absence of party.
- § 20. Absence of counsel.
- § 21. Absence of witness or evidence.
- § 24.—Cumulative or impeaching evidence.
- § 26.—Diligence.
- § 28. Surprise at trial.
- § 29.—In general.
- § 30.—Amendment of pleading.
- § 32. Admissions to prevent continuance.
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- § 43. Affidavits for continuance.
- § 46.—Statement of grounds.
- § 49. Conditions on granting.

See Criminal Law, XI.

Allowing further time for preparation of case, see Account, § 19.

Discretion of court, see Criminal Law, § 1151.

Reversal for error in refusing continuance, see Criminal Law, § 1146.

§ 7. Discretion of court.

The court does not abuse a sound discretion in overruling a motion for continuance, where the same order had been repeatedly moved by the same party who had shown no diligence in procuring a copy of their discharge in bankruptcy, especially where there was a rule to try.

Hamilton v. Barnes, 5 Ky. Opin. 167.

There is no abuse of discretion in refusing a continuance of a trial to enable a litigant to secure evidence, where it is shown that the witnesses resided in a neighboring county; and the fact that notice was given, and the depositions of such witnesses were not taken because the witnesses desired the presence of plaintiff's assignor, does not show diligence such as is required.

McAfee v. Rurrack & Smith, 10 Ky. Opin. 812.

§ 8. Successive applications.

It is not an abuse of discretion for the trial court to overrule a motion for a continuance in order to give defendants time to file pleadings and prepare for trial, where two continuances had theretofore been granted for the same purpose.

Tutt v. Kincaid, 11 Ky. Opin. 310.

§ 14. Amendment of pleadings.

It is not sufficient to authorize a continuance, where an amended petition is filed, for the party to state that he is surprised by the amendment, since the facts should be presented in the form of an affidavit or in the bill of exceptions, which would show that the defendant could not be ready for trial at that time.

Swift's Iron & Steel Works v. Dye, 5 Ky. Opin. 261.

Where the court sets aside the order submitting a cause for final hearing and allows a party to file an affirmative pleading, the court should allow the cause to be continued that other parties should have an opportunity to prepare to meet the allegations contained in such new pleading; and it is error for the court to have such cause immediately resubmitted and to decide the cause the same day.

McIntosh v. Oldham, 12 Ky. Opin. 90.

§ 19. Absence of party.

The fact that appellant would have been able to impeach some of the witnesses who testified against him, if he had been present at the trial, would not have been cause for a continuance.

Duff v. Rose, 6 Ky. Opin. 27.

§ 20. Absence of counsel.

Upon calling of a cause for trial, if counsel withdraws and has his name stricken from it, it is the duty of the court to continue the action and award a rule against plaintiff to prosecute his suit; and a delay for such rule can rarely produce injury, when, to give judgment immediately upon withdrawal of counsel, is fraught with great danger to the client.

Bohannank v. Mills, 2 Ky. Opin. 597.

§ 21. Absence of witness or evidence.

It is the duty of a defendant, knowing of the absence of a material witness, to move for a continuance; alleged drunkenness being no legal excuse for defendant's absence and is culpable neglect of his own case.

Burrick v. Burns, 2 Ky. Opin. 62.

A party is not entitled to a continuance, on account of the absence of

his witnesses, unless he has used diligence to place himself in a position to compel their attendance by attachment.

Howard v. Hisle, 3 Ky. Opin. 476.

A defendant, upon taking the deposition of a witness, as to one ground of his defense, is not entitled to a continuance to enable him to further examine the witness as to other matters.

Walton v. Young's Exr., 3 Ky. Opin. 251.

24.—Cumulative or impeaching evidence.

It is not error to refuse a continuance on account of the absence of a witness, when the affidavit shows that the facts that he would swear to if present are the same as sworn to by other witnesses.

Kentucky Central R. Co. v. McMurry, 11 Ky. Opin. 509.

§ 26.—Diligence.

Where an affidavit for a continuance manifests due diligence in preparing for the defense, and shows that the testimony of his absent witness would be material for establishing his lien and the extent of it, a motion for a continuance should be sustained, and where overruled, a new trial will be awarded by the appellate court.

Elrod v. Anderson, 2 Ky. Opin. 141.

Where plaintiff and defendant announced themselves ready for trial, and the trial progressed until plaintiff was ready to examine a witness who had not been subpoenaed, and who had left the town since the trial had begun, plaintiff was guilty of negligence and must suffer the consequences.

Riley v. Cocanaugher, 7 Ky. Opin. 206.

Where an action for damages for a personal injury was begun on July 25, and called for trial Aug. 9, 1881, and the physician who treated the injury was not present at the trial, and the party requiring his evidence had no opportunity to have him subpoenaed or to take his deposition, who if present would testify that the injuries re-

ceived were very slight, the continuance ought to have been granted on the application of the defendant.

Kentucky Cent. R. Co. v. Carey, 12 Ky. Opin. 392.

No continuance will be granted to a party on account of absent evidence where no sort of diligence is shown in the preparation of the case and to produce the evidence at the trial.

Bogard & Bro. v. Buckner, Terrell & Co., 12 Ky. Opin. 581.

§ 28. Surprise at trial.

A trial of a cause, ordered at the same term of court at which an amended answer is filed, setting forth new matter, is erroneous, since it should be continued till the next succeeding term.

Hukel v. Pramblett, 3 Ky. Opin. 539.

§ 29.—In general.

A continuance on the ground of surprise on the part of defendant will not be allowed where such defendant has not been diligent in procuring his evidence.

Morgan v. Wood, 9 Ky. Opin. 101.

§ 30.—Amendment of pleading.

The defendant, not having waived his right to do so by his laches, has a right to set up any valid defense that exists, and where just before a trial the court allows the defendant to file an amended answer in a proper case he should continue the cause to permit the plaintiff time to prepare to meet the new defense pleaded.

Willis v. McNeal's Admr., 10 Ky. Opin. 260.

§ 32. Admissions to present continuance.

§ 33.—In general.

It is not error to refuse a continuance where by agreement of the parties the affidavit filed in support of a motion for a continuance is permitted to be read as evidence in the cause.

Rudd v. Weisinger, 5 Ky. Opin. 567.

§ 43. Affidavits for continuance.

§ 46.—Statement of grounds.

One can not, by improperly incorporating irrelevant matter in an affidavit for continuance because of the

absence of a witness, get it before the jury.

Citizens' Passenger R. Co. v. Pank,
7 Ky. Opin. 663.

§ 49. Conditions on granting.

Where appellant obtained at least one continuance because of the absence of his counsel, when the cross-petition against him could have been taken for confessed, and then at the next term also applying for another continuance, the court had a right to put him under terms, and did not abuse a sound discretion in then rejecting that part of his answer setting up the statute of limitations.

Hall v. Hazelrigg's Admr., 3 Ky. Opin. 656.

CONTRIBUTORY NEGLIGENCE.

See Negligence, III.

Recovery notwithstanding, see Negligence, § 83; Street Railroads, § 103.

CONTRACTS.

I. REQUISITES AND VALIDITY.

(A) NATURE AND ESSENTIALS IN GENERAL.

- § 2. What law governs.
- § 4. Implied contract.
- § 9. Certainty as to subject-matter.
- § 10. Mutuality of obligation.

(B) PARTIES, PROPOSALS, AND ACCEPTANCE.

- § 11. Capacity to contract in general.
- § 12. Contract in particular capacity.
- § 13. Number of parties.
- § 27. Implied agreement.

(C) FORMAL REQUISITES.

- § 31. Necessity of writing in general.
- § 33. Form and contents of instrument.
- § 38. Affixing revenue stamps.
- § 40. Several instruments.
- § 42. Delivery.
- § 45. Evidence.

(D) CONSIDERATION.

- § 47. Necessity in general.
- § 49. Nature and elements.
- § 50.—In general.
- § 54. Sufficiency in general.
- § 55. Mutual promises.

§ 68. Compromise.

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§ 87. Evidence as to consideration or failure thereof.

(E) VALIDITY OF ASSENT.

§ 92. Physical or mental condition of party.

§ 93. Mistake.

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(F) LEGALITY OF OBJECT AND OF CONSIDERATION.

§ 102. Intent of parties.

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(D) PLACE AND TIME.

§ 211. Time as of the essence of the contract.

§ 212. Reasonable time.

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(F) COMPENSATION.

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- § 324. Nature and form of remedy.
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- § 332.—Declaration, complaint, or petition in general.
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- § 335.—Performance by plaintiff.
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- § 346.—Issues, proof, and variance.
- § 347. Evidence.
- § 348.—Presumptions and burden of proof.
- § 351. Trial.
- § 352.—Questions for jury.
- § 353.—Instructions.

See Breach of Marriage Promise; Constitutional Law, VII, C; Guardian and Ward, § 47; Infants, IV; Insane Persons, VI; Insurance, V; Municipal Corporations, VII; Partnership, § 173; Novation; Rewards; Sales; Subscriptions.

Actions for breach of contract of purchase, see Vendor and Purchaser, VII, B.

Agreement as to partition of land, see Partition, § 4.

Agreements not to be performed within a year, see Frauds, Statute of, V. Antenuptial contracts, see Husband and Wife, § 49½; Dower, § 41.

As to location of railroad, see Railroads, § 46.

As to right of way, see Railroads, § 64.

Authority of county officers to contract, see Counties, § 113.

Between husband and wife, see Husband and Wife, § 36.

Between mother and son, consideration, see Parent and Child, § 3.

Between parent and child, see Parent and Child, § 9.

Breach of contract made with county court, see Counties, § 128.

By counties, see Counties, §§ 111, 114.

By infants, see Infants, IV.

By married women, see Husband and Wife, IV, C.

By married woman on sale of real estate, see Husband and Wife, § 46.

By married women to purchase real estate, see Husband and Wife, § 79.

By personal representative of deceased person, see Executors and Administrators, § 95.

Cancellation for fraud and overreaching, see Cancellation of Instruments, §§ 5, 55.

Champerty contracts, see Champerty and Maintenance, § 4.

Construction of special contract of shipment, see Carriers, § 63.

Construction work, see Railroads, § 110.

Damages for breach of contract, see Damages, VI, C.

Damages for breach of contract of purchase, see Sales, § 370.

Enforceable by specific performance, see Specific Performance, II.

Extinguishing of debt by marriage of parties, see Husband and Wife, § 10.

For shipment of goods, see Carriers, § 61.

Impairing obligation of, see Constitutional Law, § 114.

Implied contracts, see Corporations, § 451.

Liability for acts of co-tenant, see Tenancy in Common, § 55.

Lottery contract, see Lotteries, § 15.

Made on Sunday, see Sunday, §§ 10, 13.

Of hire, see Slaves, § 8.

Of indemnity, see Indemnity.

Of subscription to corporate stock, see Corporations, §§ 75, 78.

Partition agreement, see Partition, § 4.

Performance of contract of sale, see Sales, IV.

Power of partner to bind firm by contract, see Partnership, § 139.

Public improvement contract, see Municipal Corporations, IX, C.

Required to be in writing, see Frauds, Statute of.

Rescission by purchaser, see Vendor and Purchaser, III, C.

Rescission by vendor, see Vendor and Purchaser, III, B.

Rescission of contract of sale, see Sales, III.

Reversal of judgment on contract against public policy, see Appeal, § 1169.

Separation agreement, see Husband and Wife, § 278.

Terms of contract effected by custom, see Customs and Usages, § 17.

Time of performance, see Frauds, Statute of, V.

To bequeath or devise property, see Wills, III.

Usurious contracts, see Usury, I.

I. REQUISITES AND VALIDITY.

(A) NATURE AND ESSENTIALS IN GENERAL.

§ 2. What law governs.

Whether a contract was executed in Kentucky or Ohio can not matter where the laws of each state touching the question in dispute are substantially the same.

Jones v. Turner, 6 Ky. Opin. 499.

Where a contract is executed in the state of Ohio and a mortgage to secure it is executed on land in this state, the mortgage is a mere incident to the debt, and the laws of Ohio determine the rights of the parties; and such a mortgage is a valid security, although upon land belonging to the wife.

Watson v. Franklin Building Assn., 9 Ky. Opin. 371.

§ 4. Implied contract.

Where in a written contract a person agrees that he will, during the year, furnish ice to a dealer, at an agreed price, and the purchaser agrees

to pay such price for so much of the ice as might be delivered to him, the law implies an agreement upon his part to receive and pay for the ice.

Cronnie v. Monsh, 8 Ky. Opin. 340.

§ 9. Certainty as to subject-matter.

An alleged contract by parol agreement between father and son, no writing of any kind having ever been made, was held too vague for judicial action, and was unenforceable.

Palmore v. Chapman, 2 Ky. Opin. 653.

§ 10. Mutuality of obligation.

In every contract by which the services of one person are engaged to another, there exists mutual obligations and reciprocal duties, which are either expressed or implied by law, for the breach of which either party may terminate the engagement.

Otis & Co. v. Power, 1 Ky. Opin. 312.

Where the minds of the contracting parties do not meet on the essentials of a contract such contract is not complete.

Dean v. Meter, 8 Ky. Opin. 746.

(B) PARTIES, PROPOSALS, AND ACCEPTANCE.

§ 11. Capacity to contract in general.

Evidence of witnesses who give it as their opinion that a person has or has not capacity to contract, without stating any facts on which they base their opinion of his capacity except that he is a bad trader, is not of very great weight.

Riley v. Albertson, 11 Ky. Opin. 316.

When a person has mind enough to understand the subject, that is, deliberate upon the matter and weigh the consequence, he is competent to contract, and no want of skill or experience or weakness of mind will destroy mental capacity to contract, but these elements are to be considered where fraud is charged.

Riley v. Albertson, 11 Ky. Opin. 316.

§ 12. Contract in particular capacity.

Although appellants are described in the contract as a committee, their

undertaking to pay the agreed price for the monument is personal in its character.

German v. Muldoon & Bullitt & Co., 5 Ky. Opin. 485.

§ 13. Number of parties.

An instrument which does not name an obligor, as well as an obligee, is invalid and unenforceable.

McKinster v. Eastham, 6 Ky. Opin. 423.

§ 27. Implied agreement.

The law will not imply a promise to pay merely from the fact that one person had advanced money for the assumed debt of another, without the request or consent of the party in whose favor the money was advanced.

Brady v. Lanham, 6 Ky. Opin. 147.

(C) FORMAL REQUISITES.

§ 31. Necessity of writing in general.

Where in the sale of property, it was agreed that the same property should again be sold by the purchaser, and whatever the difference should be the vendor would sustain the loss, the agreement was not required to be in writing, and in the absence of fraud or improper conduct in the resale of the property, recovery may be had for any loss sustained.

Savings Institution of Harrodsburg v. Hutchinson, 7 Ky. Opin. 517.

Mutual promises do not have to be in writing in order to make them obligatory on the parties.

Stone v. Richmond & Tate's Creek Tpk. R. Co., 1 Ky. Opin. 172.

§ 33. Form and contents of instrument.

A clause in a memorandum obligation, made in settlement of accounts between parties, of "due, etc., if there is no mistake," will secure no right to either party which a court of equity will not correct, if either of the parties can show there was a mistake in the settlement prejudicial to the one complaining, in the absence of the words quoted.

Chandler v. Rowe's Admr., 2 Ky. Opin. 254.

§ 38. Affixing revenue stamps.

The mere failure to cancel a stamp

placed on a written contract does not invalidate it.

Reed v. Rodes, 6 Ky. Opin. 685.

§ 40. Several instruments.

A written contract unsigned may be referred to as containing the agreement between the parties with as much certainty, if not more, than the mere recollection of witnesses, and may be regarded as the establishment of a parol agreement.

Heil v. Esselman, 2 Ky. Opin. 128.

§ 42. Delivery.

The fact that the writing is in the possession of the appellees, raises the legal presumption that it was delivered to them by the parties that did sign it and it was, therefore, incumbent upon them to rebut this presumption or to establish that appellees undertook to procure the signatures of all the parties mentioned in the body of the writing.

German v. Muldoon & Bullitt & Co., 5 Ky. Opin. 485.

§ 45. Evidence.

The general rule is, when parties have entered into a written contract, that it is taken as the evidence of their final agreement, and no liability inconsistent with the writing can be proven in the absence of fraud or mistake.

Bowen & Son v. Martin, 1 Ky. Opin. 42.

(D) CONSIDERATION.

§ 47. Necessity in general.

Where, since the assignment of a note, the assignor and his surety, without additional consideration, undertook, by a written agreement to make good the collection of a note, the obligors can not be held responsible on such undertaking.

Kean's Admx. v. Dehoney's Admr., 6 Ky. Opin. 160.

The alleged promise by appellee to appellant to give him all he could make by attending to a suit was gratuitous, and could not be enforced.

Hogan v. Hogan, 3 Ky. Opin. 630.

Where a soldier at the command of defendant took plaintiff's mare when defendant was not present, the prom-

ise of defendant to send the mare back or pay for her, being made without consideration, is unenforceable.

Osborne v. Bradshaw, 6 Ky. Opin. 424.

The mere agreement by a creditor to release a debt or a part of a debt is not binding for the want of consideration, but when the creditor, by reason of a new contract, obtains additional indemnity or security and in consideration of that fact releases a part of his demand such release can be enforced.

Deall v. Maxwell, 9 Ky. Opin. 93.

Where a person accepts an estate devised to him which requires him to support and maintain another out of it, such person is entitled to a reasonable support, and an agreement with the ancestor by which she agrees to take less than what she is entitled to is without consideration and can not be insisted upon by the devisee.

Hillis v. Hillis, 10 Ky. Opin. 961.

To maintain an action upon an implied as well as on an express promise, there must be a consideration, either prejudicial to the plaintiff or beneficial to the defendant in the action in order to uphold it.

Gaines v. Scott, 11 Ky. Opin. 361.

§ 49. Nature and elements.

§ 50.—In general.

Congress has no power to control contracts, or to impair the obligations thereof, which were made in the state according to its laws and which derived their obligations from and are amenable only to such laws.

Reed v. Rodas, 6 Ky. Opin. 685.

§ 54. Sufficiency in general.

Where M. surrendered a mule to C. upon the promise of R., in consideration of the surrender, to pay M.'s note to G., upon R.'s failure to pay the note, and payment of same by M., R. is liable to M. for the amount paid by M.

Rodman v. Miller, 6 Ky. Opin. 148.

A contract, providing for the sale of tobacco to reimburse a surety, with a provision for a return of \$200.00 to the wife who signed the contract is a

sufficient consideration to uphold the contract.

Robinson v. White, 3 Ky. Opin. 713.

The arrest and imprisonment being unlawful, the contract to pay appellant for services to be rendered to effect the appellee's release was not unlawful or against the policy of the law, nor was it without consideration.

Munday v. Leathers, 5 Ky. Opin. 455.

What constitutes a valid consideration is a matter of law, and a purchaser of real estate claiming to have paid a valid consideration should show what he did pay, that the court may judge of its validity.

Buckley v. Board, 8 Ky. Opin. 16.

A promise to pay a debt after discharge in bankruptcy, is upon a valid consideration and may be enforced.

Worsham's Admr. v. Miller, 8 Ky. Opin. 19.

Where a party did not bind herself in a contract sued upon to pay anything more than she was already legally bound to pay, but in which she secured the advantage of having her notes canceled and the land finally subjected to the payment of another's judgment, the contract was held to be supported by a sufficient consideration.

Rowland v. Buford & Co., 9 Ky. Opin. 513.

An express promise can not be supported by a consideration from which the law would not imply a promise, except where the express promise does away with a legal suspension or bar of a right of action, which but for such suspension or bar would be valid.

Minter's Admr. v. Englehard, 9 Ky. Opin. 745.

§ 55. Mutual promises.

In order to uphold a mutual promise it is not necessary that a consideration shall pass from the promisee to the promisor; it is sufficient if the promisee parts with property or suffers some loss or prejudice.

Stone v. Richmond & Tate's Creek Tpk. R. Co., 1 Ky. Opin. 172.

§ 68. Compromise.

Where persons disagree, and conflicting claims are asserted by each, and a suit is pending between them concerning the same, a contract between them providing for the settlement of such differences and the dismissal of the suit is based upon a good consideration, and such a contract is enforceable unless the same is abandoned or rescinded by consent of both.

Davis v. Davis' Admr., 10 Ky. Opin. 446.

§ 70. Forbearance.

Where W., a remote assignee of B., made a parol agreement that if a sale bond, taken by a sheriff in satisfaction of a judgment of B., was quashed, and B. was compelled to refund any part of the same, that W. would pay the same without suit to avoid costs and further litigation; the promise was founded upon a sufficient consideration, and is binding upon W.

Wade v. Williams, 4 Ky. Opin. 302.

§ 87. Evidence as to consideration or failure thereof.

It is not erroneous to allow the introduction of parol evidence to prove that notes given for an omnibus with which to operate a mail route failed of consideration, in that the mail contract thus transferred was not renewed according to the contract.

McLeod & Young v. Harvey, 4 Ky. Opin. 110.

In action on a contract it may be proven that the agreement itself constituted part of the consideration of the note contemporaneously executed.

McLeod & Young v. Harvey, 4 Ky. Opin. 110.

(E) VALIDITY OF ASSENT.**§ 92. Physical or mental condition of party.**

Where appellee had taken one or two drams the morning the contract was made, and although the lawyer who wrote the contract of sale, and others who saw him that morning did not discover that he was under the influence of liquor or incapacitated to make such a trade, still there was no doubt but what he was still laboring

under the effects of his debauch and was in such a condition of mind as to be entirely reckless, not only in regard to his estate, but to every sense of moral duty, the bargain was unconscionable.

Donahoo v. Grigsby, 5 Ky. Opin. 631.

Mere mental imbecility of one of the parties to a contract does not render the contract void; since such contracts, if fairly made and fully executed without knowledge on the part of the other contracting party, are not even voidable by the lunatic or by any one claiming under him.

Waller's Admr. v. Harrison, 8 Ky. Opin. 717.

§ 93. Mistake.

In some cases a party may be relieved against a contract entered into by mistake of law; thus where a party agrees without consideration to remain bound upon a contract from which in law he has been released, and the agreement is made in ignorance of his legal rights, the court may refuse to enforce the agreement and treat it as a nullity.

First National Bank of Franklin v. Ford & Bros., 10 Ky. Opin. 251.

§ 94. Fraud and misrepresentation.

Where there is fraud in a contract vitiating a part of it, it will vitiate the whole contract, and a party can not hold on to a part of a contract and repudiate such part as he may select.

Evans v. Ryan, 8 Ky. Opin. 720.

(F) LEGALITY OF OBJECT AND OF CONSIDERATION.**§ 102. Intent of parties.**

Even if the terms of a contract are neither rational nor just, still if there is no ambiguity in the contract, the court has no right to conclude that the parties to it did not mean what their language plainly imports.

Imeson & Limerick v. Newport & Covington Bridge Co., 12 Ky. Opin. 492.

§ 103. Contravention of law in general.

The law will not enforce a contract made in violation of its mandate.

Martin v. Taylor's Admr., 8 Ky. Opin. 559.

§ 108. Public policy in general.

Where A. who was a candidate for office entered into a contract with B. who was a candidate for the same office, whereby A. agreed to withdraw from the race and to use his influence for the election of B., in consideration that B., if elected, would give A. employment at a stated salary, the contract is illegal and void as against public policy.

Holland v. Vallandingham, 7 Ky. Opin. 3.

A sale of expectancy may be constructively fraudulent, but when it is shown to be fair and for a full consideration it is not voidable by the recipient of the consideration.

Chism v. Chism, 1 Ky. Opin. 10.

A sale of an expectancy, unassailable as a fraudulent conveyance to one, under the supposition that their mother had only a life interest in property devised her by her husband, will be confirmed, and the title subsequently acquired by the grantors from their mother will inure to the benefit of their vendee so as to vest a legal title in him.

Sanford v. Edwards, 2 Ky. Opin. 502.

A contract to refrain from selling liquor by retail for one year is not against public policy.

Ewing & Patterson v. Winfrey, 5 Ky. Opin. 741.

The defense that a transaction contravenes public policy is not allowed for the defendant's advantage, but for the public good, and should only be upheld where the evidence satisfactorily shows that the party seeking relief has violated some public law.

Robinson's Trustee v. C. D. Hamilton, 6 Ky. Opin. 419.

Where B.'s were arrested by a military force and confined in a military prison, a contract between E. and B.'s whereby E. was to use his influence with the military commander to secure the release of B.'s from illegal imprisonment and from court-martial, such undertaking can not be regarded as an agreement to obstruct or defeat the administration of justice.

Eginton v. Brain, 7 Ky. Opin. 516.

A contract made by a county clerk to furnish copies of naturalization papers to voters, to be paid for by a candidate for office to secure votes, is contrary to public policy and void, as the influence originating from the execution of such contracts should not be allowed to operate on the elector casting his vote, or the official who by law is designated as one of the instruments to confer upon him the right of suffrage.

Warnock v. Loran, 10 Ky. Opin. 226.

§ 133. Aid to public enemy.

Where it is not shown that the place where the contract was made was under the control of the Confederate army, the contract can not be held illegal which consists of the promise by appellant to see that confederate money paid was good money.

Justice v. Justice, 3 Ky. Opin. 586.

II. CONSTRUCTION AND OPERATION.**(A) GENERAL RULES OF CONSTRUCTION.****§ 143. Application to contracts in general.**

The admitted receipt of the defendant for one hundred dollars in Confederate money to go as a credit on notes which the defendant held on plaintiff, imports a contract and was obligatory, unless the consideration was illegal, or the execution of the receipt was procured by duress.

Smith v. Scott, 5 Ky. Opin. 438.

A contract should be treated as a full and correct expression of the intention of the parties until the contrary is established beyond reasonable controversy.

Talbott v. Lee, 4 Ky. Opin. 94.

§ 145. Place of making contract.

The delivery of a note at the place of residence in Indiana of the payee is an execution of the contract in Indiana, and nothing else appearing, the rights of the parties under the contract must be determined by the law of Indiana.

Wohman v. Venable & Wagner, 10 Ky. Opin. 253.

§ 147. Intention of parties.

In the absence of fraud or mistake, the intention of the parties to a written contract must be gathered from the writing, and parol evidence is inadmissible to show that the appellees did not so understand the note.

Bowman v. McBrayer, Trapnell & Co., 8 Ky. Opin. 15.

While it is the purpose in construing a written contract to arrive at the intention of the parties to it, such intention must be gathered from the writing itself.

Price v. Rodman, 11 Ky. Opin. 7.

All contracts will be interpreted so as to arrive at the intentions of the parties to them, and the language used should receive a construction influenced by a common-sense view of the whole subject-matter and bearing of the contract between the parties.

Wheat v. Frankfort Cotton Mills Co., 11 Ky. Opin. 903.

§ 150. Written contracts in general.

Where parties have reduced their agreement to writing in such terms that there is no uncertainty as to its object or extent, it must be conclusively presumed to state the entire contract, but where it appears upon its face or by its purport that only a part of the contract has been stated, or that it is incompletely expressed and held unintelligible, parol evidence may be resorted to to ascertain the entire contract.

Pyne v. Edwards, 13 Ky. Opin. 795.

§ 151. Language of instrument.**§ 152.—In general.**

In construing a written contract the whole of it must be considered rather than detached provisions and the intent of the parties to it, gathered from the purport and tenor of all the terms employed in it.

Bramlette's Admx. v. Boyce, 11 Ky. Opin. 711.

§ 164. Construing instruments together.

Different writings relating to the same subject executed at the same time to effectuate the same object are

to be construed together as one instrument.

Shanks v. Stephens, 13 Ky. Opin. 179.

§ 169. Extrinsic circumstances.

The phrase "merchantable coal," as used in a contract for the purchase of coal for use on a steamer, was held to be lump coal, where the kind of coal was not specified.

Applegate v. Nunn, 6 Ky. Opin. 275.

§ 170. Construction by parties.

The court in construing the terms of a contract will adopt the construction placed thereon by the parties for a long period of time after its execution, and so a contract acquiesced in by the owner of a stone quarry by her permitting a turnpike company to take stone out of it for a period of forty years, and by paying for such stone so taken out, the turnpike company construes such contract as not entitling it to take the stone without paying for it.

Louisville Tpk. Co. v. Shadburne, 10 Ky. Opin. 770.

§ 175. Evidence to aid construction.

Where it is clearly and unmistakably shown that both parties to a contract attached to a word or expression used a meaning different from that ordinarily applied to it, and that to refuse to allow such understanding to control would be to enforce a contract which they did not intend to make, oral evidence is admissible to show what the understanding of the parties was as to the contract.

Marshall v. Benge, 6 Ky. Opin. 339.

Ordinarily courts will not hear oral evidence as to what parties understood to be the meaning of a written contract, but will look alone to the language used to ascertain the meaning.

Marshall v. Benge, 6 Ky. Opin. 339.

(B) PARTIES.**§ 185. Rights acquired by third persons.**

Where one bids off the state's inter-

est in a turnpike and executes a bond to carry out the purchase, but never pays anything on the contract, and the bond is surrendered after a term of eight years, persons unknown to such contract will not be allowed to recover on it by averring that they were secret partners of the purchaser of said turnpike.

Commissioners of Sinking Fund v. McDowell, 13 Ky. Opin. 195.

(C) SUBJECT-MATTER.

§ 189. Scope and extent of obligation.

Where, under an arrangement between a debtor and a third person, the latter undertook to pay off the former's indebtedness, the fact that the third person paid off some debts created after the agreement, does not charge him with the payment of other debts created since the agreement.

Shanklin v. Weir, 7 Ky. Opin. 552.

A contract by a bailee to become responsible for all the existing debts of a steamboat, the use of which has been transferred to him, is held to be an obligation only to pay such debts and liabilities as were liens on the boat for their payment, and not for such debts as had been contracted by former bailees for speculation.

Fowler Mills & Co. v. Smedley, 2 Ky. Opin. 389.

§ 194. Loans and advances.

A contract, "to put to M.'s credit with a transfer thereof, a quantity of the whisky produced therefrom, free from taxes, etc., an amount of whisky ample to pay and reimburse said M. for said grant, and he to have a lien upon the whisky so produced," etc., conveys merely a lien upon the whisky to secure the payment of the agreed price of the grain furnished.

Morris v. Hayner & Dunlevy, 4 Ky. Opin. 556.

(D) PLACE AND TIME.

§ 211. Time as of the essence of the contract.

Where a vendor of land reserved an option to repurchase the land within a specified time upon a payment of a stated consideration, time is of the es-

sence of the contract, and if the vendor fails within such time to execute his option, the vendee's right becomes absolute.

Hall v. Lee, 6 Ky. Opin. 366.

The time of performance is not always of the essence of an executory contract for the sale of land as to authorize a rescission upon failure of prompt performance, but it is incumbent on the party seeking performance of such a contract to show that he has done everything in his power to comply with his contract, or that his failure came from some cause over which he had no control, and where a good excuse for his failure is shown and he has within a reasonable time tendered performance and no injury has resulted to the other party the chancellor will enforce the contract.

Stoen v. First National Bank of Warren, Pa., 11 Ky. Opin. 796.

§ 212. Reasonable time.

Where one contracts to build a house in consideration of the conveyance of real estate, and no time is agreed upon when it shall be built, the law implies that it was to be erected within a reasonable time and its construction to begin at once, as the contract had been performed by the other party to it.

Grant v. Settle, 10 Ky. Opin. 800.

§ 214. Time of payment of compensation.

The price of digging a well is due when the well is completed and the work accepted by the proper authority, and the guaranty that it will produce a certain amount of water for one year does not have the effect to postpone payment until the end of such year.

Mackey v. Owsley, 10 Ky. Opin. 295.

(E) CONDITIONS.

§ 221. Conditions precedent in general.

In a contract for burning 200,000 brick, where the evidence shows they were to be used for the erection of a dwelling, the making and burning the exact number is not a condition precedent.

Barret's Admr. v. Hill, 3 Ky. Opin. 360.

(F) COMPENSATION.**§ 231. Contracts for buildings and other works.**

Where a building contract was changed, permitting the contractor to put in a stone foundation instead of brick as called for by the specifications, it was held that the contractor was not bound to comply literally with the specifications in the construction of the foundation, because of the use of different material, necessitating a difference in the manner of construction.

McMurty v. Tenny, 6 Ky. Opin. 453.

So far as the work has been done under the original agreement, it should be enforced, and so far as there was an express agreement for alterations, it should be likewise enforced; and for such extra work as was not expressly agreed upon it should be allowed in so far as its value can be estimated by the work embraced in the original contract.

Heil v. Esselman, 2 Ky. Opin. 128.

If the owner in violation of his contract failed to erect a house, he is liable for the value of the contractor's services rendered in superintending and advising in its erection as far as it has been erected.

Hohn v. Middleton, 10 Ky. Opin. 285.

When it is stipulated in a building contract that the last payment should be made when the building is completed according to the terms of the contract, the owner is entitled to retain that sum until the contract is complied with; and where such sum is paid over to the contractor and not retained, a surety on the contractor's bond is released to the amount of said sum.

Vanmeter v. Corcoran, 11 Ky. Opin. 15.

§ 232. Alterations and extra work.

A contractor was held not entitled to pay for extra work on account of stone walls put in being thicker than brick walls called for by the specifications, since the stipulations in regard

to the change of materials require the cost to be the same.

McMurty v. Tenny, 6 Ky. Opin. 453.

III. MODIFICATION AND MERGER.**§ 238. Written contracts.**

A parol agreement can not destroy the obligatory effect of a written note.

Murphy v. Hubble, 1 Ky. Opin. 146.

§ 240. Modification as to parties.

There can not be a novation of contract, because nothing but gold and silver coin can be made legal tender; neither can a creditor claim a novation, where he does not in a reasonable time offer to perform the contract.

McCormick v. Morton, 1 Ky. Opin. 504.

§ 241. Alteration or addition of terms.

Where M and S. Were partners in business, and P sold D a boat belonging to the partnership, for the price of \$300.00; and M sued D for conversion of the boat, alleging that P was insane at the time of the sale, and that the boat was worth \$450.00, which allegations D denied; and the case was submitted to the court without the intervention of a jury, and it was adjudged that P was insane at the time of the sale to D., and that the boat was worth \$450.00; M. had no right to ask, and the court to make a new contract with D., and force him to keep the boat at a price he did not agree to give, as there is nothing in the case which warrants the conclusion that D. was guilty of such conduct in the purchase of the boat as to render his purchase absolutely void, and if P. was incapable of transacting business by reason of his insanity, then M., as the surviving partner, was entitled to a rescission of the contract and no more.

Digby v. Mefford, 4 Ky. Opin. 272.

§ 247. Evidence.

A written contract can not be contradicted or essentially modified by parol testimony, in the absence of a showing of fraud or mistake.

Adams v. Martin, 6 Ky. Opin. 7.

IV. RESCISSION AND ABANDONMENT.

§ 249. Contracts subject to rescission.

Where a party complaining of a contract entered into the same fairly and voluntarily he cannot avoid it.

Smith v. Smith, 4 Ky. Opin. 543.

Even in a case of absolute imbecility, when there was entire good faith, and the contract was just and proper and for the benefit of the imbecile, a court of equity will not interfere to annul it.

Parrot v. Parrot's Exr., 8 Ky. Opin. 682.

§ 257. Grounds for rescission by party.

§ 258.—In general.

Where a contract has been executed by a conveyance made and accepted, the contract can not be rescinded unless there was fraud in procuring the acceptance of the deed, or for some reason such as the insolvency or non-residence of the grantor.

Knight v. Berry, 10 Ky. Opin. 337.

Where misrepresentations are made as to the boundaries of land contracted for, but they are not shown to have been made with a fraudulent intent, and where the opportunities for knowledge are about equal by the parties to such contract, there are no grounds for a rescission.

Hazlip v. Austill, 12 Ky. Opin. 117.

Where a contract includes the transfer of land on both sides, and the purchase of personal property as well, it is of such an entirety and of such a nature that the one part can not without injustice be rescinded without rescinding it as a whole.

Winscott's Exr. v. Hutchins, 12 Ky. Opin. 355.

§ 259.—Invalidity of contract.

A contract will be rescinded on cross-petition of a vendee, who has subsequently purchased a part of the land from the party who is seeking to rescind the contract of his purchase on the ground of fraudulent statements made to him, where he has represented to his vendee that the statements he complains of were true.

Culbertson v. Seaton, 2 Ky. Opin. 25.

§ 261.—Failure of performance or breach.

Where one party to a contract fails to perform a condition precedent, within a reasonable time, the other party has a right to regard the contract at an end.

Goff v. Howard, 2 Ky. Opin. 30.

When one purchased real estate verbally, and his vendor refused to comply with its terms by an offer to convey, there should be a judgment rescinding the contract.

Hamilton v. Smith, 9 Ky. Opin. 583.

§ 263. Conditions precedent to rescission.

It is error to adjudge a rescission of a contract for the purchase of a livery stable without securing an accounting for rents and profits.

Campbell v. Goodwin, 3 Ky. Opin. 70.

§ 268. Persons entitled to rescission.

Where a will vested the title to all the testator's real estate in the executors, they have the power in the exercise of their discretion, to sell and convey, and they also have the power out of court to rescind the contract of sale, and the widow and heirs are not necessary parties.

Harris v. Field's Exrx., 5 Ky. Opin. 559.

A contract made with a married woman, who was also under age, should be annulled upon complaint by her and her husband, and restitution made on equitable principles.

Benedict v. Snoddy & Co., 2 Ky. Opin. 610.

Where three persons join in making a contract, it can not be rescinded by two of them.

John v. Thompson, 9 Ky. Opin. 599.

§ 272. Acts constituting rescission.

A change in the original plan of a building does not release the contractor from liability for defective work causing leakage.

Moore v. Lehman, 6 Ky. Opin. 607.

V. PERFORMANCE OR BREACH.**§ 275. Obligation to perform in general.**

Where N. was the first to violate the contract, he ought not to be allowed to recover damages against B. because he afterwards declined to carry it out.

Bartlett & Co. v. Newcomb, 4 Ky. Opin. 699.

§ 278. Performance of conditions.

In an action by a contractor on a contract to build a barn, its completion being a condition precedent to payment, must be proven or an actual waiver shown.

Lewis v. Evans, 10 Ky. Opin. 729.

§ 296. Deviations and alterations.

Where there is a departure from the specifications of a contract to make certain improvements looking to securing water power necessary to run a manufacturing plant, but such improvements when completed answered every purpose and were as valuable and substantial as the plan first agreed upon, the contractor is entitled to the contract price.

Smith v. Smyser, 11 Ky. Opin. 176.

§ 297. Partial performance.

Appellant had such an interest in the profits in the stock of goods on hand, to the amount of one-half of the net profits, if he performed his part of the contract fully by selling them out, which he had partly performed, as to entitle him to possession for the purpose of completing his part of the contract.

Goode's Admr. v. Blackwell, 5 Ky. Opin. 692.

§ 305. Waiver of defects and objections.

The completion and use of a building by the owner, where the contractor fails to complete it, does not necessarily amount to a waiver of his objection to the quality of the work.

Lewis v. Evans, 10 Ky. Opin. 730.

§ 308. Payment of compensation.

Where an obligor binds himself, for a valuable consideration, to pay a certain sum in gold or silver, the contract will be specifically enforced.

Woodson v. Mitchell, 1 Ky. Opin. 568.

VI. ACTIONS FOR BREACH.**§ 324. Nature and form of remedy.**

A party violating a contract may assert his claim for services, not upon the contract, but upon the implied promise to pay what his services were reasonably worth.

Lee v. Davis, 5 Ky. Opin. 617.

§ 326. Grounds of action.

If a fraudulent contract be performed in whole or in part, and the other parties ratify and confirm it by receiving and enjoying the money or property received under it, and by suit recover and collect in addition thereto such damages as they may have sustained by reason of the fraud of their adversaries, every principle of justice demands that the latter should have a right of action against them for at least that portion of the consideration actually paid.

Gless v. Snooks, 5 Ky. Opin. 364.

Where a contract called for delivery of personal property, at a given point, in settlement of notes, though the property be not accepted, the debtor is entitled to recover against the creditor the value of such of the property as was lost by reason of the creditor's negligence.

Lackey v. Blandy, 2 Ky. Opin. 476.

§ 330. Parties.

Where a contract to sell lumber to a firm is made and partly executed by the delivery of lumber, and the seller refuses to make any further deliveries on such contract, but he did deliver the same on an agreement of a third person who was the owner of the building which was being built with such lumber, a suit can not be maintained on account against such firm and the owner of such building.

Buford v. Taylor & Faulkner, 8 Ky. Opin. 98.

No recovery can be had upon proof of a several promise by one of the defendants in a joint action against all.

Buford v. Taylor & Faulkner, 8 Ky. Opin. 98.

§ 331. Pleading.**§ 332.—Declaration, complaint, or petition in general.**

The allegation of the petition as to

the date of the contract will be regarded as the correct date in considering the question of limitation.

Hank v. Hank, 5 Ky. Opin. 479.

Where appellee placed various claims in the hands of an attorney for collection and took his receipt for same, and by written indorsement assigned the claims to appellant, covenanting that if the claims should not net to appellant \$1,050 when collected in a suit on the covenant appellant alleged that he had only collected of the claims the net amount of \$886, and that no more could be collected and the court below sustained a demurrer to the petition, the averments of the petition clearly show a breach of the covenant.

Davis v. Montgomery, 1 Ky. Opin. 214.

In a suit for recovery of amount due under verbal contract to manage a farm, and, "if the sum of \$1,000.00 is not made annually, the deficit to be made up by the owner," it must be alleged in the petition that the particular amount was not realized, and shown in what the discrepancy consists, in order to recover thereon.

Guy v. Guy, 2 Ky. Opin. 265.

Where a petition, giving all the alleged agreements between the parties, asks for general relief, the plaintiff is entitled to either a specific performance or a rescission of the contracts as alleged.

Gard v. Greer, 3 Ky. Opin. 98.

Without allegations of a breach of agreement, the most positive and direct proof is unavailing.

Gate v. Rouse, 4 Ky. Opin. 241.

A petition for breach of a contract to deliver possession of real estate purchased by plaintiff from defendant, which alleges the purchase of the land from defendant, the occupancy of the land by a tenant of defendant, the agreement of defendant to deliver possession, the refusal of defendant to surrender possession to plaintiff until several months after plaintiff was entitled thereto, states a cause of action.

McIntire v. Cater, 6 Ky. Opin. 146.

Where a petition on a written contract does not positively aver a promise, but such a promise is inferentially averred, and no motion to make it more specific is made, it will be held sufficient after answer, since the filing of the answer waives the error.

Bank of Columbia v. Bush, 11 Ky. Opin. 559.

§ 333.—Allegation or statement of contract or promise.

One who seeks to recover on account of a breach of contract must allege, in his petition, the contract and its provisions, its breach, and facts showing the loss or damage sustained by him, because of the breach.

Crittenden County v. Conger, 11 Ky. Opin. 485.

§ 334.—Consideration.

It is not necessary to plead usury where the statute declares all contracts for more than legal interest void to the extent of the usury, as a court of equity will not enforce a void contract.

Murphy v. Nelson, Admr., 1 Ky. Opin. 77.

§ 335.—Performance by plaintiff.

When covenants in a contract are mutual, and are to be performed at the same time, neither party can maintain an action without averring a tender; and in cases where the first act is to be done by the defendant, plaintiff must aver his readiness to comply.

Judy v. Swinney, 8 Ky. Opin. 156.

To recover on an executory contract, plaintiff must aver facts in his petition showing that he was ready and willing, on the day stipulated in the contract to perform his part of it.

Van Meter v. Pepper, 8 Ky. Opin. 827.

One bringing suit on a settlement contract must aver fulfillment or a readiness to fulfill his part thereof.

Davis v. Davis' Admr., 10 Ky. Opin. 446.

§ 338.—Plea, answer, or affidavit of defense.

A mere breach of a revenue law of the United States can not be pleaded

in bar of a recovery on a contract valid under the laws of this state.

McCormick v. Garth, 1 Ky. Opin. 588.

Before a breach of contract can introduce proof excusing him from performance, because prevented by the act or conduct of his adversary, he must first aver such fact in his pleading.

Judy v. Swinney, 8 Ky. Opin. 156.

A counterclaim for damages growing out of a contract is bad which fails to state the amount of damages sustained, or to demand a recovery of any stated sum.

Mellaney v. Young, 8 Ky. Opin. 165.

Before a breach of contract can be relied upon as a defense to an action to collect the contract price, it must be pleaded by the defendant.

Mellaney v. Young, 8 Ky. Opin. 165.

§ 346.—Issues, proof, and variance.

Before a party to a suit is entitled to prove a rescission of contract he must have pleaded the same.

Craig v. Brame, 8 Ky. Opin. 163.

Before plaintiff can recover for breach of a contract, he must not only aver and prove defendant's failure to comply with its terms, but he must aver and prove that he himself complied with or was ready to carry out his agreement.

McGuire v. McGuire, 8 Ky. Opin. 253.

Before plaintiff can be relieved from the terms of a written contract he must aver and prove facts showing his right to such relief.

Mississippi Cent. R. Co. v. Munchison, 8 Ky. Opin. 357.

Where a contract is to divide the proceeds of sales of personalty, until the defendant is known to have received proceeds on account of sales made by the plaintiff there is nothing to divide, and no breach of the contract is shown.

Bell v. Great American Fire Extinguisher Co., 10 Ky. Opin. 759.

§ 347. Evidence.

Where A. contracted to sell B. seven hogsheads of tobacco, six of which were to be good leaf tobacco and one to contain lugs; and in a suit for breach of the contract plaintiff proved that there were three hogsheads of lugs, which was denied by defendant; but the testimony of witnesses of defendant did not purport to show that the particular tobacco they saw in defendant's barn was put into hogsheads and delivered to plaintiff, nor did they see it delivered at the depot for shipment; such testimony can not sustain a general denial of breach of contract as shown by answer of defendant.

Holland v. Cason, 1 Ky. Opin. 607.

Where a draftsman makes a mistake in reducing to writing a contract for the purchase of land, his evidence is competent to establish that fact.

Leeds v. Blackwell, 1 Ky. Opin. 528.

§ 348.—Presumptions and burden of proof.

The presumption of both law and facts are that a written memorial of agreement contains all the covenants of the parties, and he that asserts that some were left out by mistake or oversight must bear the burden of proof.

Goff v. Howard, 2 Ky. Opin. 30.

The burden of proving the existence of an agreement that a contract was to be void upon certain conditions, where such agreement is not embodied in the contract in suit, is on the party averring that there was such an agreement.

Craig v. Brame, 8 Ky. Opin. 163.

A written contract is conclusively presumed to contain all the agreement between the parties, unless it is specifically alleged and proved that by mistake or fraud the writing does not embrace the contract as entered into between the parties.

Hooser's Admr. v. Hooser, 10 Ky. Opin. 229.

Where on contracts with an agent the burden is on him, in a suit for its breach, to show not only that the agent made the contract, but also that

he acted within the scope of his authority in doing so, for in the absence of such authority it will not be presumed that the agent had authority to make contracts.

Crittenden County v. Conger, 11 Ky. Opin. 485.

§ 351. Trial.

§ 352.—Questions for jury.

In an action for a breach of contract, the jury should determine, if required by the parties, the amount to which the defendant is entitled by way of damages by reason of the matters set up in her counterclaim.

Moore v. Lehman, 6 Ky. Opin. 607.

§ 353.—Instruction.

An instruction in effect that if appellant agreed to take ten additional hogs to make up the supposed average pounds per head, nothing could be found on account of misrepresentation as to the weight, made by appellee, was not erroneous.

Duff v. Rose, 6 Ky. Opin. 27.

Where appellee alleges in his petition that the stage of the water in the river was such that the coal contracted for could have been delivered after the first of October, 1867, and before the first day of March, 1868, but does not designate the earliest date at which such delivery could have reasonably been made, and perhaps if that count had been taken as confessed, he would have been entitled under it to no more than nominal damages, the court properly refused to instruct the jury, that the appellants were not bound to deliver the coal mentioned in the contract until a reasonable time "after there were such rises in the Ohio and Kentucky rivers as enabled the defendants to send it in the usual way from Pittsburgh to Frankfort."

McCready v. Scott, 5 Ky. Opin. 440.

In a suit for breach of contract in failing to erect a house, there was no error in the court charging the jury that upon the failure to build the house the plaintiff was entitled to damages; and where it was claimed by the defendant that his failure to build the house resulted from the refusal of the plaintiff to board the hands,

the court very properly charged the jury if that was true no recovery could be had unless the plaintiff after that time had notified the defendant of her readiness to proceed with the work of furnishing such board.

Grant v. Settle, 10 Ky. Opin. 800.

CONTRIBUTION.

As between heirs, see Descent and Distribution, § 73.

Between sureties, see Principal and Surety, § 170.

Between sureties on administrator's bond, see Executors and Administrators, § 531.

Right to, between sureties, see Principal and Surety, § 194.

§ 1. Nature and grounds of obligation.

Where bills of exchange are drawn on letters of credit to enable a party to purchase and ship produce the presumption that the acceptor had funds of the drawer and was the prime debtor will be rebutted, and the drawer will become the primary debtor, and liable to the acceptor for advances.

Wilson & Co. v. Browder & Moore, 3 Ky. Opin. 181.

The last accommodation endorser on a bill may look for indemnity to the one endorsing next before him, and a lien resulting, on the levy of an execution on the former endorser's property inures to the last endorser's benefit, and if the payee interferes and suspends the execution the last endorser is exonerated.

Southern Bank of Kentucky v. Johnson, 3 Ky. Opin. 373.

CONVERSATION.

Admissibility in evidence, see Criminal Law, § 382; Evidence, § 216.

Proof of, see Criminal Law, § 406.

CONVERSION.

§ 3. Realty into personality in general.

§ 5. Sale of land under order of court.

§ 14. Directions in will.

§ 15.—In general.

See Trover and Conversion.

§ 3. Realty into personality in general.

Where T. and H. bought for speculation a large tract of land, and T. had parol instructions to sell same for a profit, held that upon the death of H. T.'s right to sell was revoked, nor would such contingent right of sale in the agent or trustee convert the land into money, nor impress on it the quality of personality, though H. had purchased it on speculation.

Humphries v. Humphries, 3 Ky. Opin. 721.

§ 5. Sale of land under order of court.

In the investment of proceeds of a sale, the wishes of the owner of the present interest in the land should be consulted, but the court will not act to the prejudice of the interests of the remainderman.

McDowell v. Butler, 6 Ky. Opin. 201.

Where land is sold for reinvestment, the chancellor will hold the proceeds until a suitable investment can be found, and if necessary will appoint a commissioner to find one.

McDowell v. Butler, 6 Ky. Opin. 201.

Where land of an estate is sold for reinvestment, it is not absolutely essential to the validity of the sale that the court in its decree prescribe the estate in which the proceeds should be reinvested.

McDowell v. Butler, 6 Ky. Opin. 201.

§ 14. Directions in will.**§ 15.—In general.**

Where the testator directs his real estate to be converted into personality it becomes impressed with the nature of personal property at his death.

Smith v. Moss' Admr., 11 Ky. Opin. 848.

Where, in her will, a testatrix directs her real estate to be sold and provides for distributing the proceeds to legatees, such language is mandatory; and by such direction she creates an equitable conversion of the real estate into personality before the sale; and in such a case a court of equity must regard the real estate as converted into money even before its sale.

Goldsmith v. Cone, 13 Ky. Opin. 842.

CONVEYANCES.

See Deeds; Vendor and Purchaser, IV, B.

Authority of executor to convey land of testator, see Executors and Administrators, § 394.

Between parent and child, see Parent and Child, § 9.

Bond for conveyance by married women, see Husband and Wife, § 186.

By administrator under order of court, see Executors and Administrators, § 414.

By and between legatees or devisees, see Wills, §§ 740, 742.

By heirs, see Descent and Distribution, § 84.

By husband to wife, see Husband and Wife, § 46.

By insane person, see Insane Persons, V.

By married women, see Husband and Wife, §§ 15, 69, 70, 179, 190.

By married woman—consent of husband, see Husband and Wife, § 184.

By remote vendor to remote vendee, see Vendor and Purchaser, § 145.

By trustee, see Trusts, § 188.

By wife to husband, see Husband and Wife, § 46.

By wife without consideration, see Husband and Wife, § 48.

Capacity of married women to convey, see Husband and Wife, § 69.

Capacity to convey, see Deeds, §§ 68, 194.

Champertous conveyance, see Champerty and Maintenance, § 4.

Condition precedent to suit to set aside conveyance, see Fraudulent Conveyances, § 259.

Consideration for conveyance by husband to wife, see Husband and Wife, § 29.

Deficiency in land sold and conveyed, see Vendor and Purchaser, § 165.

Husband and wife, see Husband and Wife, § 15.

In consideration of marriage, see Husband and Wife, § 47.

In partition, see Partition, § 9.

Joinder of husband and wife, see Husband and Wife, § 193.

Land patents, see Public Lands, §§ 114, 116.

Limitation of action to set aside conveyance, see Limitation of Actions, § 60.

Mental capacity to convey, see Deeds, § 12.
 Modes of, see Deeds, § 25.
 Of homestead, see Homesteads, §§ 112, 118.
 Of mortgaged property, see Mortgages, VI.
 On consideration of support, see Vendor and Purchaser, § 79.
 Prerequisite to setting aside fraudulent conveyances, see Fraudulent Conveyances, § 241.
 Procured by unfair means, see Fraudulent Conveyances, § 23.
 Quantity of land conveyed, see Vendor and Purchaser, IV, C.
 Setting aside deed without consideration, see Mortgages, § 80.
 Setting aside for fraud, see Fraudulent Conveyances, § 240.
 To execution purchaser, see Execution, VII, D.
 To husband and wife, see Husband and Wife, § 14.
 Voluntary conveyances, see Fraudulent Conveyances, § 169.
 Without consideration, see Fraudulent Conveyances, § 73.
 Without consideration, fraudulent as to creditors, see Fraudulent Conveyances, § 74.

CORONERS.

§ 9. Inquests.

§ 21.—Costs and expenses.

The city of Louisville is required to pay a competent surgeon or physician employed to make a post-mortem examination, and the city, under the statute, may regulate how and by whom such examinations shall be held in the city, and the coroner is authorized to employ such physician to make such a post-mortem examination in the county outside of the city.

Kastenbine v. City of Louisville,
 11 Ky. Opin. 471.

CORPORATE CHARTER.

Construction of, see Corporations, § 372.

CORPORATIONS.

I. INCORPORATION AND ORGANIZATION.

- § 7. General charters or acts.
- § 8.—Grant or enactment.

§ 29. Attacking validity of incorporation.

II. CORPORATE EXISTENCE AND FRANCHISE.

- § 34. Estoppel to allege or deny corporate existence.
- § 40. Amendment of articles of association.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(A) NATURE AND AMOUNT OF CAPITAL AND SHARES.

- § 63. Nature of property in shares.
- § 66. Increase of capital stock.

(B) SUBSCRIPTION TO STOCK.

- § 75. Contract of subscription in general.
- § 76.—Making, requisites, and validity.
- § 78.—Rights and liabilities of subscribers.
- § 84. Release or discharge.
- § 88. Payment.
- § 89. Calls or assessments on unpaid subscriptions.
- § 90. Actions on subscriptions.

(D) TRANSFER OF SHARES.

- § 111. Assignment of shares in general.

(E) INTEREST, DIVIDENDS, AND NEW STOCK.

- § 157. Stock dividends.
- § 158. Right to share in new stock.

V. MEMBERS AND STOCKHOLDERS.

(C) SUING OR DEFENDING IN BEHALF OF CORPORATION.

- § 202. Right to sue or defend.

(D) LIABILITY FOR CORPORATE DEBTS AND ACTS.

- § 215. Nature and grounds in general.
- § 218. Contracts and securities for payment of corporate liabilities.
- § 224. Failure to comply with statutory requirements.
- § 225. Extent of liability in general.

§ 258. Action to enforce liability.

§ 268.—Pleading.

§ 269.—Evidence.

VI. OFFICERS AND AGENTS.

(A) ELECTION OR APPOINTMENT, QUALIFICATION, AND TENURE.

- § 284. Election or appointment of ministerial officers.

(B) AUTHORITY AND FUNCTIONS.

- § 297. Authority of directors.
- § 300. President.
- § 301. Treasurer.
- § 304. Agents.

(D) LIABILITY FOR CORPORATE DEBTS AND ACTS.

- § 327. Contracts and securities for payment of corporate liabilities.
- § 350. Actions to enforce liability.
- § 354.—Defenses.

VII. CORPORATE POWERS AND LIABILITIES.**(A) EXTENT AND EXERCISE OF POWERS IN GENERAL.**

- § 370. Scope of corporate power in general.
- § 372. Constructions of charters and acts of incorporation.

(B) REPRESENTATION OF CORPORATION BY OFFICERS AND AGENTS.

- § 399. Actual or apparent authority.
- § 406. Contracts in general.
- § 415. Bonds and mortgages.
- § 416. Indemnity, guaranty, and suretyship.

(C) PROPERTY AND CONVEYANCES.

- § 437. Conveyances of or for corporation.
- § 446. Effect of conveyances and transactions ultra vires.

(D) CONTRACTS AND INDEBTEDNESS.

- § 447. Capacity to contract in general.
- § 451. Implied contracts.
- § 460. Borrowing money.
- § 462. Taking notes, bonds, mortgages, or other securities.
- § 463. Making and indorsement of negotiable instruments.
- § 465.—Form, requisites, and validity.
- § 468. Making and issue of bonds.
- § 473.—Rights and remedies of holders.
- § 475. Mortgages and trust deeds by corporation.
- § 478.—Construction and operation in general.

(F) CIVIL ACTIONS.

- § 504. Time to sue, limitations, and laches.
- § 506. Parties.

§ 507. Process and notice.

§ 512. Pleading.

§ 514.—Allegation and denial of corporate existence.

§ 519. Evidence.

§ 522. Judgment or decree.

VIII. INSOLVENCY AND RECEIVERS.

§ 541. Conveyances when insolvent or in contemplation of insolvency.

§ 543.—Bona fide purchasers.

§ 544. Preferences to creditors generally.

§ 547. Remedies of creditors in general.

§ 625. Enforcement of liabilities of officers and stockholders.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

§ 611. Proceedings to enforce dissolution or forfeiture.

§ 615.—By creditors.

§ 617. Effect of dissolution in general.

§ 618. Continuance of corporation for purpose of winding up.

XII. FOREIGN CORPORATIONS.

§ 642. Carrying on business within state.

See Bank and Banking; Carriers; Colleges and Universities; Insurance; Municipal Corporations; Quo Warranto; Railroads, II; Street Railroads; Telegraphs and Telephones.

Aid to turnpike companies, see Counties, § 154.

Assignment of stock, see Assignment, § 64.

Banking corporations, see Banks and Banking.

Cancellation of corporate bonds, see Cancellation of Instruments, § 2.

County investing in corporate stock, see Counties, § 154.

Election to proceed against corporation or its officers, see Action, § 50.

Estoppel to deny corporate existence, see Estoppel, § 94.

Levy on corporate stock, see Execution, § 28.

Lien on corporate stock, see Execution, § 131.

Right of stockholders of corporation to appeal from judgment against corporation, see Appeal, § 148.

Right of tax receipt holders to receive stock on accrued interest, see Railroads, § 15.

Stock held in trust, see Trusts, § 30½.
Subscription by county to capital stock of railroad company, see Counties, § 154.

I. INCORPORATION AND ORGANIZATION.

§ 7. General charters or acts.

§ 8.—Grant or enactment.

Where, by legislative enactment, in granting a charter or public franchise the power to amend is reserved, the legislature may amend such charter, even though investments have been made under the same which may be affected by such amendment.

C. & O. R. Co. v. Barren County Court, 8 Ky. Opin. 406.

§ 29. Attacking validity of incorporation.

Where a subscriber to stock in a turnpike company took part in the organization of the company, and paid the first claim or assessment on his subscription, he thereby waived all technical objection to antecedent proceedings.

North v. Irvin Tpk. Rd., 6 Ky. Opin. 307.

It is too late, after repeated elections of directors by the stockholders, and the subscription of thousands of dollars to the capital stock by the counties traversed by the line, for the stockholders to assail the legal organization of the company.

Lexington & Big Sandy R. R. Co. v. Bondurant, 1 Ky. Opin. 458.

II. CORPORATE EXISTENCE AND FRANCHISE.

§ 34. Estoppel to allege or deny corporate existence.

A subscriber to the capital stock of a corporation, is estopped to deny its existence, and this rule will apply, though before due date of subscription the corporate name was changed by legislative enactment; since as long as the objects and purposes of the corporation were the same, as when

the subscription was signed, the subscriber remained bound.

New Liberty Literary Institute v. Curd, 3 Ky. Opin. 211.

§ 40. Amendment of articles of association.

The right reserved by the law-making power to amend or repeal a charter, is for the protection of the interests of the state, enabling the legislature to place such restrictions upon the company as to prevent injury to the public, and, if necessary, to repeal the act itself; but where new franchises are created by amendment, and additional and increased obligations are created it is a virtual dissolution of the original contract, so far as it affects those who are not consenting and who have never ratified it.

Weir v. Ralley, 7 Ky. Opin. 379.

IV. CAPITAL STOCK, AND DIVIDENDS.

(A) NATURE AND AMOUNT OF CAPITAL AND SHARES.

§ 63. Nature of property in shares.

The capital and property of a corporation, although the corporation may have ceased to exist, is a trust fund for its creditors, and will be seized by a court of equity and applied to the payment of its debts.

Cloveport Coal & Oil Co. v. Kingsbury, 10 Ky. Opin. 118.

§ 66. Increase of capital stock.

Subscribers to an increased issue of stock may not raise the question of the right to increase the stock, where they have accepted the stock and acquiesced in the arrangement for upward of eleven years.

Jones v. Newport & Licking Tpk. R. Co., 11 Ky. Opin. 698.

The sole owners of the chartered rights and franchises of the corporation as well as its property have the right to increase the capital stock and prescribe the terms on which it may be sold.

Jones v. Newport & Licking Tpk. R. Co., 11 Ky. Opin. 698.

(B) SUBSCRIPTION TO STOCK.

§ 75. Contract of subscription in general.

§ 76.—Making, requisites, and validity.

One who enters into a written agreement, agreeing to convey to a number of men a patent owned by him, after a corporation is formed to accept a certain number of its shares in consideration of said conveyance, and such corporation is formed and he participates in its proceedings at an election held after its organization, he is legally bound to comply with his contract of subscription.

Chick v. Randall Grain Separator Co., 11 Ky. Opin. 435.

§ 78.—Rights and liabilities of subscribers.

Where a corporation has its special charter taken from it by the legislature, and it has no assets and owes no debts, equity demands that the various subscribers for its stock shall as nearly as possible be placed in statu quo.

Providence Mining, Mfg. & Shipping Co. v. Towner's Admr., 9 Ky. Opin. 399.

When a county becomes a stockholder in a private corporation, it becomes liable like other stockholders, and it may be sued on its subscription the same as any other stockholder, and no demand for payment is necessary.

Ostenton v. Carter County, 12 Ky. Opin. 464.

§ 84. Release or discharge.

Where the act of incorporation enlarges the legal liability of the stockholders, and assumes liabilities which, by the express terms of the subscription, were prohibited, a subscriber will be released of his obligation.

Tully v. Cane Run & Kingsmill Tpk. Rd. Co., 5 Ky. Opin. 330.

Where the appellant took two shares of stock, but at the time the subscription was made no act of incorporation had been obtained, and shortly thereafter application was made to the legislature and an act incorporating the company was obtained, but under a different name

from that set forth in the subscription paper, the legal effect of the obligation being to pay so much money to construction of a particular turnpike road, the change of the name of the company, whether by a vote of the directors, or by an act of the legislature, does not alter appellant's liability.

Tully v. Cane Run & Kingsmill Tpk. Rd. Co., 5 Ky. Opin. 330.

A subscriber for stock in a railroad company is released from his subscription by a subsequent alteration of the organization of the company when such alteration is fundamental and not contemplated by the charter or the general law; but his liability remains if the alteration or amendment is accepted by the subscriber, and his acceptance may be either by express action or by his acquiescence; especially is this true in a contest between a creditor of the company, after the subscription is made, and the subscriber for stock.

Glover's Exr. v. Myer & Hay, 10 Ky. Opin. 940.

§ 88. Payment.

Where articles of incorporation provided that stock subscribed for and closed up before the first election of directors and officers, could be paid for in any species of property, personal or real, the payment to be ratified afterwards by the officers of the company; unless the provisions as to the requisite amount of stock to be subscribed were fully performed, no officers could be elected, and any transfer of real estate for stock would be subject to rescission by the vendor.

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The measure of damages for failure to pay for subscription to stock is not its par, but its cash value on the day to be paid.

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It is not material whether a subscriber for stock had notice of calls made on the subscribers for payment, where his contract is to pay as the president and directors may direct.

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It is not material whether a subscriber for stock had notice of calls made on the subscribers for payment, where his contract is to pay as the president and directors may direct.

Jones v. Hunston, 6 Ky. Opin. 284.

Where a railroad company is hopelessly insolvent and unable to carry out the purposes of its creation, and is in process of liquidation, stockholders can not be required to pay on their subscriptions a greater sum than is necessary to satisfy outstanding liabilities, and where a creditor shows in his petition that there are debts due the corporation from persons not indebted to it on account of stock subscription, sufficient to pay his claim, and such debtors are not shown to be insolvent, he must exhaust them before he can recover against stockholders.

Woolly v. Combs, 9 Ky. Opin. 405.

Stock subscribers are only liable on their subscriptions for stock in a railroad company to raise funds to pay debts, where such company has gone out of business; and there must be debts by the company before there is any liability.

Woolly v. Combs, 8 Ky. Opin. 103.

§ 90. Actions on subscriptions.

A promise to pay a subscription to stock in a corporation, at such times as called upon thereafter, is in effect a promise to pay on demand, and no precedent act is necessary on the part of the payee holding such undertaking, to entitle him to his action.

Bogy v. Kirksville Tpk. Rd. Co., 3 Ky. Opin. 165.

A subscription to the capital stock in a turnpike company, in writing, is a binding obligation and enforceable according to the terms of the same.

Bogy v. Kirksville Tpk. Rd. Co., 3 Ky. Opin. 165.

Where appellee, upon return of nulla bona on an execution against the M., etc., Turnpike Co. brought suit in equity, making appellants defendants as garnishees, and called on them to state what amount they owed on their subscription to the capital stock in the company; and they answered and denied that they owed anything, as their subscription of given amounts of stock were on condition that the road was to be laid out upon the division of the road on which they lived, and that the appellee was a contractor on another division, and

they denied the right to appropriate their subscription otherwise than upon the condition set out; and these allegations were not denied; as the railroad company could not sue and receive of the garnishees the amounts of their various subscriptions to be laid out on other divisions of the road, so a contractor on such other division could not recover from them.

Hays' Exr. v. Mackin, 4 Ky. Opin. 43.

(D) TRANSFER OF SHARES.

§ 111. Assignment of shares in general.

A majority even of the members of a corporation have no power to make donations of its capital stock, unless sanctioned by its charter.

Riley v. Masonic Joint Stock Co. of Owenton, 9 Ky. Opin. 573.

(E) INTEREST, DIVIDENDS, AND NEW STOCK.

§ 157. Stock dividends.

An association of men has no right to declare and pay dividends when there has been no net profits to authorize the dividends, since dividends paid or credited out of the principal of a fund are illegal as against general creditors.

Citizens Nat. Bank v. Dronillard, 13 Ky. Opin. 251.

§ 158. Right to share in new stock.

Where the original stockholders in a turnpike company are the owners of all the stock issued and have paid for the same and completed their road, but at no time during many years thereafter have received any dividends on their investment, they may by resolution authorize the issuance of additional stock to themselves to the amount of the tolls collected during such years, and those thereafter becoming the owners of additional stock by new directors have not the power to cancel the additional stock issued to the original stockholders, since the issuance of such stock was valid.

Jones v. Newport & Licking Tpk. R. Co., 11 Ky. Opin. 834.

The original stockholders in a turnpike corporation, having paid for their stock and being the owners of the property and franchises of the company, by their board of directors, have the power to prescribe the terms upon which others may become jointly interested and the price at which new stock issued may be purchased.

Jones v. Newport & Licking Tpk. R. Co., 11 Ky. Opin. 834.

V. MEMBERS AND STOCKHOLDERS.

(C) SUING OR DEFENDING IN BEHALF OF CORPORATION.

§ 202. Right to sue or defend.

The stockholders and subscribers to the capital stock of a corporation are not concluded by a judgment confessed by its president virtually to himself, from assailing it and reducing the amount.

Lexington & Big Sandy R. R. Co. v. Bondurant, 1 Ky. Opin. 458.

(D) LIABILITY FOR CORPORATE DEBTS AND ACTS.

§ 215. Nature and grounds in general.

Persons who do not deny that they are stockholders in a corporation can not escape liability by denying that they signed their names to a subscription list for stock.

Excelsior & Eureka Petroleum Co. v. Maxwell, 3 Ky. Opin. 445.

§ 218. Contracts and securities for payment of corporate liabilities.

Where the original subscriber to stock of a turnpike company bound himself to pay ten per cent. annually on the stock subscribed for until the road is out of debt, the fact that a subsequent subscriber did not enter into such obligation does not relieve the original subscriber from the obligation.

Conrad v. Cynthiana, &c., Tpk. Co., 7 Ky. Opin. 149.

An agreement by subscribers for stock in a turnpike company to pay ten per cent. annually on the stock subscribed for until the road is out of debt, is not an agreement to take additional stock in case it should be

found necessary, but is a mutual agreement between the stockholders upon sufficient consideration to donate to the company in the proportion indicated, a sum sufficient to pay the debt incurred in the construction of the road.

Conrad v. Cynthiana, &c., Tpk. Co., 7 Ky. Opin. 149.

§ 224. Failure to comply with statutory requirements.

Before persons forming a trade association have signed articles of incorporation under Gen. Stat., ch. 56, to legally act as a corporation and bind the corporation by contract, they must give the published notice provided by § 5 of said chapter; and where they have bought goods in the name of such corporation before such notice is published they will become personally liable for such purchase.

Robinson & Co. v. N. J. Harris, 12 Ky. Opin. 634.

§ 225. Extent of liability in general.

A stockholder of a turnpike company can not be allowed to rely on his want of knowledge touching a matter concerning which he should have informed himself when it is within his power to do so.

Jones v. Hunston, 6 Ky. Opin. 284.

§ 258. Action to enforce liability.

§ 268.—Pleading.

In suing on an undertaking of subscribers to stock in a turnpike company to pay ten per cent. on the stock subscribed for until the company is out of debt, it is not necessary to allege directly that the call sued on was required to pay the debt of the company.

Conrad v. Cynthiana, &c., Tpk. Co., 7 Ky. Opin. 149.

§ 269.—Evidence.

Evidence is incompetent which seeks to prove an understanding with one director of a corporation as to property when it is not made to appear that such director has been duly authorized to bind the corporation.

Israel v. Louisville Jockey Club & Driving Park Assn., 12 Ky. Opin. 593.

VI. OFFICERS AND AGENTS.

(A) ELECTION OR APPOINTMENT, QUALIFICATION, AND TENURE.

§ 284. Election or appointment of ministerial officers.

Where the book containing the proceedings of a corporation shows that the president was elected, it must be assumed that notice of the election was given, in absence of proof to the contrary.

Peter & Harber v. Ferrell, 1 Ky. Opin. 255.

(B) AUTHORITY AND FUNCTIONS.

§ 297. Authority of directors.

An order entered by the directors of a bank to the effect that they are satisfied that the bank had been robbed and that its cashier and his bondsmen are not liable for the loss, is not conclusive, either upon the stockholders or the corporation.

Lorretto Benevolence Assn. v. Pope, 7 Ky. Opin. 681.

Where the president of appellee's board of managers, did many things without consulting the board, of which he was a member, and his acts were generally approved without objections by other members of the board, the question of the president's authority to execute the notes in question was a fact, upon which it was the province of the jury to pass.

Frankfort & Lawrenceburg Tpk. Rd. Co. v. Herndon's Exr., 1 Ky. Opin. 226.

§ 300. President.

The president and directors of a turnpike company are the agents of stockholders who are bound to know what the officers do.

Jones v. Hunston, 6 Ky. Opin. 284.

The president of a corporation holding a note has the right to assign it in discharge of a liability of the company, and his assignment passes the legal title to the note.

Peter & Harber v. Ferrell, 1 Ky. Opin. 255.

§ 301. Treasurer.

It is the duty of an officer of a corporation, who had given his payee an order on the treasurer and ac-

cepted, payable out of a certain fund, to set aside so much thereof as is necessary to liquidate same, when said certain funds come into his hands as such officer.

Miller's Admr. v. Maxville Tpk. Rd. Co., 2 Ky. Opin. 658.

§ 304. Agents.

An agent of a corporation has no power to buy from himself, unless the transaction is ratified by the corporation.

Kentucky Tobacco Assn. v. Halladay & Co., 7 Ky. Opin. 724.

(D) LIABILITY FOR CORPORATE DEBTS AND ACTS.

§ 327. Contracts and securities for payment of corporate liabilities.

Where directors of a corporation or trustees execute a note by signing their individual names to it, not as trustees, they become individually liable thereon to the owner of such note; and whether they may discharge such liability out of the trust estate is not a matter of interest to the owner, but is one to settle in the settlement of the trust.

Cooper v. Collins' Exr., 10 Ky. Opin. 591.

§ 350. Actions to enforce liability.

§ 354.—Defenses.

Where defendant questions the right of the president of a company to act for the company in bringing suit, the proper mode of procedure is not by answer, but by rule against the president to exhibit his authority to act.

Henry v. Lebanon & Cissell's Creek, &c., Tpk. Co., 7 Ky. Opin. 210.

VII. CORPORATE POWERS AND LIABILITIES.

(A) EXTENT AND EXERCISE OF POWERS IN GENERAL.

§ 370. Scope of corporate power in general.

A corporation derives its powers from its charter, and these can not be enlarged by contract with third persons, although their exercise as to particular parts of corporate property may be limited by such contracts,

when to do so will not affect the rights of the public by impairing its ability to accomplish the purposes of its creation.

Kentucky University v. White, 10 Ky. Opin. 89.

§ 372. Construction of charters and acts of incorporation.

Where a corporation charter provided that when 2,000 shares of \$10.00 each were subscribed for, the stockholders were authorized to meet and elect a board of directors and officers, no corporate acts could be performed until the requisite amount of stock had been, in good faith, provided for.

Rice v. Clark, 4 Ky. Opin. 355.

(B) REPRESENTATION OF CORPORATION BY OFFICERS AND AGENTS.

§ 399. Actual or apparent authority.

A mining and manufacturing company having the right to subscribe for stock in a railroad company, has the right to pay for the stock in money or negotiable obligations.

Kentucky Coal, &c., Co. v. Lexington, &c., R. Co., 7 Ky. Opin. 131.

§ 406. Contracts in general.

Where a corporation purchases property, it will not be permitted to avoid payment on the ground that the credit was given to the president of the company and not to the company.

Enterprise Imp. & Mfg. Co. v. Ofill, 13 Ky. Opin. 936.

§ 415. Bonds and mortgages.

Corporate bonds are not void on account of their being made payable semi-annually in the city of New York instead of annually at Ashland, as prescribed by the order of its directors, providing for their execution and delivery, where such action was subsequently approved by the directors.

Kentucky Coal, &c., Co. v. Lexington, &c., R. Co., 7 Ky. Opin. 131.

§ 416. Indemnity, guaranty, and suretyship.

Where stockholders of a corporation to raise money to carry on the enterprise sign an agreement to each become liable for his share of liability assumed by any of them for money

to be used by the corporation, and such liability is assumed by members, and the corporation becomes insolvent, and it turns out that some of the stockholders signing such agreement are insolvent, the insolvency of such members will not add to the liability of the others, for each became liable not for the others but only in proportion to the stock owned, and the insolvency of such signing members will add only to the loss which must be sustained by the members assuming obligations for the corporation.

Wheat v. Frankfort Cotton Mills Co., 11 Ky. Opin. 903.

Where a corporation is in need of funds to carry on its enterprise, and the stockholders enter into an agreement in writing between themselves, by which they agree in proportion to their holdings to share any liability that any of them may assume to raise funds for the corporation, and some members become liable for such funds, the signers of such agreement become liable for their proportionate shares.

Wheat v. Frankfort Cotton Mills Co., 11 Ky. Opin. 903.

(C) PROPERTY AND CONVEYANCES.

§ 437. Conveyances of or for corporation.

Property conveyed to a corporation is to be held under the conveyance and charter as if they constituted but one instrument.

Kentucky University v. White, 10 Ky. Opin. 89.

§ 446. Effect of conveyances and transactions ultra vires.

A purchase of property from a corporation which it had acquired in exchange for stock, with notice of the status of the vendor and the company, and the want of consideration, is estopped from setting up claim to the property as against the original vendor.

Rice v. Clark, 4 Ky. Opin. 355.

(D) CONTRACTS AND INDEBTEDNESS.

§ 447. Capacity to contract in general.
A corporation may so contract by

an agent, or the acts and conduct of those in authority may evidence such an assent, as to impose on the corporation deriving a benefit therefrom an obligation to pay for it.

Imeson & Limerick v. Bridge Co.,
12 Ky. Opin. 493.

§ 451. Implied contracts.

Where, in the absence of a contract, property has been appropriated by a corporation to its use, only the value of the property can be recovered.

Kentucky Tobacco Assn. v. Halladay & Co., 7 Ky. Opin. 724.

§ 460. Borrowing money.

Where, by the provisions of the charter the directors were authorized to borrow money to pay losses, they may borrow from the stock fund of the company instead of going into the money market.

Merhoff v. Hope Ins. Co., 5 Ky. Opin. 110.

§ 462. Taking notes, bonds, mortgages, or other securities.

A corporation like the United Circle Daughters of Rebecca, having the right to deal in stocks, bonds and mortgages by way of investment, has the right to loan its money and take notes secured by personal endorsement, and such notes are binding upon those who execute the notes.

Helmerdinger v. United Circle, Daughters of Rebecca, 10 Ky. Opin. 769.

§ 463. Making and indorsement of negotiable instruments.

Where there is no joint and several obligation to pay, and the face of the instrument shows clearly that the intention was to bind the company only, and the instrument points directly to the revenue of the corporation as the source from which the money is to be derived, there is no individual liability on the officers whose names appear on the instrument.

Youtsey v. Trap, 5 Ky. Opin. 426.

Where a note signed by a corporation, by A. and B., as officers, but in the body of same using the word "we," it creates an individual liability of the officers signing same.

Berry's Admr. v. Ratcliff, 4 Ky. Opin. 372.

A purchase of a right of way for a corporation, is a sufficient consideration to uphold a note given by the individual directors of the corporation.

Berry's Admr. v. Ratcliff, 4 Ky. Opin. 372.

Where a note is signed by the obligors as president and directors of a corporation, and in the body of the note the parties jointly and severally agree to pay the money, and there being nothing pointing to the funds of the corporation as the source from which the obligee was to derive his money, they are jointly and severally liable.

Youtsey v. Trap, 5 Ky. Opin. 426.

§ 465.—Form, requisites, and validity.

Before a corporation can be held liable on a note not signed by it, it must be averred and shown that it was taken and received as the obligation of the corporation, and that by mistake the parties failed to insert language creating the liability.

Dinsmore v. Crawford, 9 Ky. Opin. 98.

Where a corporation is formed to construct a turnpike road, which road it was provided should be built by the money raised by stock subscriptions, but which proved insufficient for that purpose, and the directors ordered the president to borrow money and execute a note, which was done, which action is thereafter ratified by the board, such corporation is liable for such borrowed money.

Chenault v. Grigsby, 9 Ky. Opin. 258.

§ 468. Making and issue of bonds.

§ 473.—Rights and remedies of holders.

When bonds of a street railroad company are issued by the consent of all of its directors and stockholders, in pursuance of a contract of sale of the stock of the road, the sellers receiving some of the bonds as a consideration for the transfer of their stock, the fact that such sellers soon after the issue of the bonds resigned as directors in the interest of those becoming the purchasers, and who constructed the road and assumed all the liabilities growing out of it, ought

not to be considered as evidence of fraud on the part of either.

Covington St. R. Co. v. Shinkle, 11 Ky. Opin. 58.

§ 475. Mortgages and trust deeds by corporation.

§ 478.—Construction and operation in general.

Where a railroad company, to secure the payment of bonds issued to pay for construction, executes a mortgage on its road bed, franchises, rolling stock, securities and evidences of debt to a trustee, such a mortgage will include unpaid subscriptions for the stock of the company; and a judgment creditor causing execution to issue and securing a return of no property found can not, in a court of equity, have such subscriptions subjected to pay his judgment.

Eckstein, Norton & Co. v. Myer & Hay, 10 Ky. Opin. 942.

(F) CIVIL ACTIONS.

§ 504. Time to sue, limitations, and laches.

When, by reason of the dissolution of a corporation, and its officers, agents and managers having left the state, there was no one left upon whom to serve process, the statute of limitations ceased to run against one having a cause of action against it.

Cloveport Coal & Oil Co. v. Kingsbury, 10 Ky. Opin. 118.

§ 506. Parties.

An action for a corporate liability lies against the corporation, and not against the stockholders of the corporation.

Ray v. Knowles, 5 Ky. Opin. 569.

§ 507. Process and notice.

Where an officer's return is: "Executed by delivering to Joel Lambert a true copy of the within summons," it is not such service on the company as is required by law.

Hopkins Mastodin Iron, Mining & Mfg. Coal Co. v. Burbank, 5 Ky. Opin. 62.

Where process was served on all the persons designated as agents of the defendant corporation in the county,

the court has jurisdiction to render judgment.

Licking River Lumber & Mining Co. v. Bowlesby, 6 Ky. Opin. 371.

§ 512. Pleading.

§ 514.—Allegation and denial of corporate existence.

Where paragraphs of answer which attempt to deny the existence of a corporation are uncertain whether the defendant intends to allege that there never was such a corporation, or to allege that the corporation had ceased to exist, it is insufficient for uncertainty.

North v. Irvin Tpk. Rd., 6 Ky. Opin. 307.

A paragraph of answer to a complaint of a corporation, which fails to allege the facts from which it appears that the charter granted by the county court was void, was held insufficient.

North v. Irvin Tpk. Rd., 6 Ky. Opin. 307.

§ 519. Evidence.

A new contract in lieu of the written contract of a corporation may be proved by parol, and the burden of proof is on the party asserting such new contract, but such party, however, is not required to show a resolution of the board approving the change of contract.

Imeson & Limerick v. Bridge Co., 12 Ky. Opin. 492.

§ 522. Judgment or decree.

The holder of a judgment against a railroad corporation may compel the company or its officers and agents to disclose and surrender its property, choses in action or equitable or legal interests which it may own or which are held by or for it by strangers.

Louisville & N. R. Co. v. Hall, 8 Ky. Opin. 690.

VIII. INSOLVENCY AND RECEIVERS.

§ 541. Conveyances when insolvent or in contemplation of insolvency.

§ 543.—Bona fide purchasers.

Where appellee sold a right of way over his land to a railroad company for \$200, payable in two instalments;

and he failed to collect the amount so due, and the company's property, bonds, etc., were sold by order of court, and purchased by appellants, a new corporation organized under a new charter, the new organization can not be made liable for the debts of the first organization, never having assumed any of its obligations.

Lexington & Big Sandy R. R. Co.
(Eastern Division) v. Fain, 1
Ky. Opin. 618.

An act providing for the organization of a new corporation in which the provision, "to raise the necessary funds to pay the debts not secured by mortgage or deed of trust, and the punctual payment of interest on its debts and liabilities," is held to clearly contemplate that the property of an old corporation it acquired should pass to it, pledged for the payment of the debts of the old company.

Masonic Temple Co. v. Ward, 2
Ky. Opin. 378.

§ 544. Preferences to creditors generally.

The assets of a corporation constitute a trust fund for the payment of creditors, and then for stockholders.

Zim's Admr. v. Lawrence's Exrs.,
12 Ky. Opin. 436.

§ 547. Remedies of creditors in general.

Where a railroad company is insolvent and can not complete the object of its creation, and must go into liquidation, all the subscribers and stockholders should be made parties in order that each may bear his pro rata share of the indebtedness of the corporation.

Lexington & Big Sandy R. R. Co.
v. Bondurant, 1 Ky. Opin. 458.

§ 625. Enforcement of liabilities of officers and stockholders.

The stockholders of a corporation, in liquidation, are responsible for their pro rata of the indebtedness of the corporation, though the amount was incurred by a few of the stockholders under a recorded pledge by the company of reimbursement.

Excelsior & Eureka Petroleum Co.
v. Maxwell, 3 Ky. Opin. 445.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

§ 611. Proceedings to enforce dissolution or forfeiture.

§ 615.—By creditors.

A mere creditor, whose claim has not been put in judgment against a life insurance company, can not maintain an action to subject the company's property to his claim and to the claims of others, and have such assets distributed; since the most that he is entitled to is to have judgment on his debt, and the property of the company sold to pay it.

Hagan v. Kentucky Mut. Life Ins.
Co., 9 Ky. Opin. 782.

§ 617. Effect of dissolution in general.

The dissolution of a railroad corporation does not relieve it from the payment of its debts, but a corporation succeeding to the ownership of such debtor may be made to give up enough of such assets to satisfy such debts.

Cumberland & O. Ry. Co. v. Harrison, 10 Ky. Opin. 878.

§ 618. Continuance of corporation for purpose of winding up.

Where a railroad company is out of business because of the sale of its franchises, it still exists for the purpose of collecting what is due it and paying its debts.

Woolley v. Combs, 8 Ky. Opin. 103.

XII. FOREIGN CORPORATIONS.

§ 642. Carrying on business within state.

A private corporation established in one state has the right without the consent of the state in which it is incorporated, to go into another state and there do anything it may be authorized to do by the laws of the state to which it goes.

Bramlette's Admx. v. Boyce, 11 Ky.
Opin. 711.

CORRECTIONS.

In account stated, see Account Stated,
§ 11.

COSTS.

I. NATURE, GROUNDS AND EXTENT OF RIGHT IN GENERAL.

§ 11. Discretion of court.

- § 32. Prevailing or successful party in general.
- § 42. Effect of offer of judgment, tender, or payment into court.
- § 51. Amended or supplemental pleadings.
- § 59. Apportionment.
- II. PERSONS ENTITLED.
- § 78. Parties of record.
- III. PERSONS, PROPERTY AND FUNDS LIABLE.
- § 92. Parties of record.
- § 93.—In general.
- § 99.—Persons not parties.
- § 103. Funds or estate.
- IV. SECURITY FOR PAYMENT.
- § 120. Bond, undertaking, or recognizance.
- § 139. Liabilities on bonds, undertakings, or recognizances.
- V. AMOUNT, RATE, AND ITEMS.
- § 151. Pleadings before trial in general.
- § 183. Witnesses' fees.
- § 184.—In general.
- § 189. Stenographers' fees.
- VI. TAXATION.
- § 206. Objections to taxation or to items.
- § 211. Remedies for erroneous taxation.
- § 212.—In general.
- VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.
- § 235. Reversal.
- § 240. Persons liable.
- § 253. Expenses of record, abstract, or transcript on appeal or error.
- § 254.—In general.
- § 256.—Unnecessary matter or expenditure.
- VIII. PAYMENT AND REMEDIES FOR COLLECTION.
- § 268. Time for payment.
- IX. IN CRIMINAL PROSECUTIONS.
- § 292. Liabilities of defendants.
- See Discovery, § 26; Divorce, IV, H; Husband and Wife, § 301; Wills, § 402.
- Against administrator, see Executors and Administrators, § 478.
- In action against administrator, see Executors and Administrators, § 478.
- In contest of election, see Election, § 306.
- In highway proceeding, see Highways, § 61.

In suit for divorce and alimony, see Divorce, § 288.

Liability for, see Executors and Administrators, § 485.

Liability of garnishee for, see Garnishment, § 191.

Of inquest, see Coroners, § 21.

I. NATURE, GROUNDS AND EXTENT OF RIGHT IN GENERAL.

§ 11. Discretion of court.

Adjudging all costs against a plaintiff, in a suit for settlement of a partnership, where he succeeds in showing profits made, as against a denial by co-partners, is an abuse of sound judicial discretion.

Critcher v. Alexander & Bentley,
3 Ky. Opin. 40.

§ 32. Prevailing or successful party in general.

Where a plaintiff succeeds in his action, either at law or in equity, he is entitled to his costs as against the parties over whom he has been successful.

Terry's Guardian v. Terry's Admr.,
10 Ky. Opin. 214.

§ 42. Effect of offer of judgment, tender, or payment into court.

Where, in an action, a notice of willingness to allow judgment conforms to the statute, such a defendant is entitled to a judgment for his costs thereafter expended.

Walker v. Henry, 10 Ky. Opin. 629.

§ 51. Amended or supplemental pleadings.

Where the allegations of a petition do not state a cause of action the plaintiff should be required to pay all the cost, on reversal of the case, before he should be allowed to amend.

Oldham v. Price, 5 Ky. Opin. 95.

§ 59. Apportionment.

Where the proceedings are vexatious upon the part of both litigants, and neither succeeds, each party should pay his own cost.

Higgins v. Stoy, 5 Ky. Opin. 352.

II. PERSONS ENTITLED.

§ 78. Parties of record.

A party held to have no right to

complain that costs were not allowed him up to the time of the release of mortgage.

Warner v. Hutchinson, 6 Ky. Opin. 222.

The plaintiff is entitled to his cost although his action is practically defeated.

Benningfield v. Christie, 2 Ky. Opin. 177.

Where in a petition by plaintiff, he succeeds in correcting mistakes charged in settlement of partnership account, he is entitled to recover his costs, though the petition may not be sustained and relief granted as prayed for.

Taylor v. Farley, 2 Ky. Opin. 243.

A defendant to a suit to enforce a purchase money claim, is entitled to a judgment for costs, where the defect in the title is cured during the pending litigation.

Barkley v. Russell, 2 Ky. Opin. 469.

Plaintiff is not entitled to costs where at the time the suit was brought he had no cause of action.

Butts v. Hazelrigg, 5 Ky. Opin. 221.

Under R. S., p. 288, ch. 25, § 16, relating to costs, the party who succeeds in recovering judgment in an action is entitled to a judgment for costs.

Miles v. Bayles, 6 Ky. Opin. 386.

The taxation of costs includes only costs incurred by the successful party, since each party is liable to the officer performing services for him, and in case of a successful result the costs so incurred are taxed against the adverse party.

Marks v. Graham, 11 Ky. Opin. 27.

III. PERSONS, PROPERTY AND FUNDS LIABLE.

§ 92. Parties of record.

§ 93.—In general.

Where in a suit of foreclosure, one is allowed to interplead who is successful in obtaining a partition, a judgment of one-half the costs against such

successful litigant and claimant is erroneous.

Collier v. Holland's Admr., 3 Ky. Opin. 702.

The appellant being defeated in the action is liable for legal cost, but beyond that he ought not to be made to contribute to the payment of the fees of his adversary's counsel.

Lackery v. Lackery, 2 Ky. Opin. 109.

Where an appeal is taken, but before it is decided the parties agree that the costs of two copies of the record may be paid out of the fund in dispute, and that the unsuccessful litigant should in the end pay all the costs, the appellee in such appeal is not made liable for any of the costs on account of the modification of the judgment appealed from, when in fact such modification was in no sense a defeat of said appellee.

Miller v. Mt. Savage Furnace Co., 13 Ky. Opin. 19.

§ 99. Persons not parties.

In an attachment suit where a claimant is successful in sustaining his claim to part of the property, it is error to adjudge the costs of the suit against him, though the attachment be sustained in all other particulars.

Whitaker v. Mooreman, 2 Ky. Opin. 238.

§ 103. Funds or estate.

In sustaining a claim against an estate the costs can not be deducted from the shares of the estate descending to such devisee, but should be taxed proportionately.

Bogie v. West, 3 Ky. Opin. 269.

IV. SECURITY FOR PAYMENT.

§ 120. Bond, undertaking, or recognition.

The failure of a non-resident plaintiff to give bond for costs at the time of commencing suit, was ground for dismissing it, but when on defendant's motion the plaintiff was ruled to give bond and did so, no motion having been made to dismiss, defendant waived his right to raise any question as to the failure to give such bond in the first instance.

Yarbra v. Specht, 8 Ky. Opin. 521.

The failure of a defendant to move to dismiss because no cost bond is filed amounts to a waiver of the right he has to have the action dismissed.

Lexington, L. & C. R. Co. v. Castleman, 8 Ky. Opin. 883.

A suit brought by a corporation in this state must be dismissed when it fails to give bond for costs before commencing the suit.

Bank of Columbia v. Bush, 8 Ky. Opin. 762.

Non-residents who are plaintiffs are required to give bond for costs, but where there are two persons who are plaintiffs, one a non-resident and one a resident, no bond can be required from the non-resident.

Milner v. Hatfield, 8 Ky. Opin. 536.

The defendant has the right to have an action against him dismissed when a non-resident plaintiff fails to give bond for costs, but by failing to move a dismissal he waives the right.

Townsend v. Butt, 8 Ky. Opin. 602.

A county is not a corporation within the meaning of the statute requiring all corporations to give bonds for costs when instituting actions in court.

Metcalf County Court v. Scott, 8 Ky. Opin. 628.

Where the law requires plaintiff to give bond for costs, but he fails to do so and no motion is made to require him to do so, and judgment is taken by default against one defendant and against another for a part of his debt, it is too late to move to dismiss the cause, on account of the failure to give bond; but the defendant who is still contesting a part of his debt may have the cause dismissed as to such debt, and no bond for costs can be required after judgment.

Farmers' Bank of Kentucky v. McCormack, 9 Ky. Opin. 663.

§ 139. Liabilities on bonds, undertakings, or recognizances.

One who undertakes to pay the defendant all the costs that may accrue to him at the suit of plaintiffs, is not liable for the costs incurred by a cross-action against plaintiffs.

Norton v. Anderson, 6 Ky. Opin. 331.

V. AMOUNT, RATE, AND ITEMS.

§ 151. Pleadings before trial in general.

The clerk of the court of appeals, like the clerks of other courts, is authorized to tax as costs one copy of any pleadings or exhibits obtained by the successful party.

Boyd v. Adams, 8 Ky. Opin. 647.

§ 183. Witnesses' fees.

§ 184.—In general.

Witnesses who attend examining trials where felonies are charged are entitled to witness fees, as well as when attending trials on indictments for felonies.

Auditor v. Boyd, 10 Ky. Opin. 727.

§ 189. Stenographers' fees.

The fees of the reporter for making transcripts are fixed by the judge and are payable by the party ordering the same; and a litigant who does not formally order a transcript but receives and uses it must pay for it, and if successful in the higher court such costs will be taxed against his adversary.

Marks v. Graham, 11 Ky. Opin. 27.

VI. TAXATION.

§ 206. Objections to taxation or to items.

Where a judgment plaintiff failed to file copies of his judgments, executions and returns in the circuit clerk's office and sue out execution thereon, and have levy made on defendant's land, he can not tax defendant with the costs of a proceeding in equity to collect his judgment.

Adams v. Able, 6 Ky. Opin. 14.

§ 211. Remedies for erroneous taxation.

§ 212.—In general.

Where the trial court directed that no judgment should be entered against the appellant for costs, and the attorney drawing the entry by mistake drew up a judgment for costs against him, and no minutes or memorandum is referred to, and where there is no means of establishing the mistake except to prove it by oral testimony, it can not be allowed, as such evidence is not admissible to correct such judgment.

Veatch v. Tatum, 10 Ky. Opin. 485.

VII. ON APPEAL OR ERROR, AND
ON NEW TRIAL OR MOTION
THEREFOR.

§ 235. Reversal.

Where the successful party appeals alone he must pay the cost of the appeal on the reversal of the case.

Lucas, Admr., v. Taylor, 4 Ky. Opin. 300.

§ 240. Persons liable.

The facts were held to warrant the reversal of a case without cost against the appellee.

Crawford v. Voorheis, 6 Ky. Opin. 619.

§ 253. Expenses of record, abstract, or transcript on appeal or error.

§ 254.—In general.

The cost of one copy of the record on appeal, if procured from the clerk of the Court of Appeals by the successful party, may be taxed as costs, and the fee of the clerk for making a copy for a party who has given surety for costs is "costs" within the meaning of his bond.

Myers' Admr. v. Duvall, 9 Ky. Opin. 548.

§ 256.—Unnecessary matter or expenditure.

Where a party unnecessarily encumbers the record, the opposite party should not be taxed with the full cost of making out the original record nor of copies furnished by the clerk of the court.

Davis v. McFeat, 7 Ky. Opin. 261.

VIII. PAYMENT AND REMEDIES
FOR COLLECTION.

§ 268. Time for payment.

When costs are not paid within the time allowed and the time is extended by the court they may be paid within the extended time, since Gen. Stat. 1883, ch. 26, § 27, is directory and not mandatory.

Galbraith v. Galbraith, 12 Ky. Opin. 588.

IX. IN CRIMINAL PROSECUTIONS.

§ 292. Liabilities of defendants.

A person in prison under Civ. Prac. was liable under the statute of 1865,

for his board during his confinement in the jail, at the rate of 75 cents per day, to be taxed as costs in the case, but was not liable under an implied assumption to the jailor.

Paschal v. Sheppard, 6 Ky. Opin. 387.

COUNCIL.

Proceedings by city council, see Municipal Corporations, IV.

COUNTERCLAIM.

See Set-off and Counterclaim.

COUNTERFEITING.

§ 1. Nature and elements of offenses in general.

§ 14. Jurisdiction.

§ 15. Indictment or information.

§ 16.—Requisites and sufficiency.

§ 18. Evidence.

§ 1. Nature and elements of offenses in general.

There is no statute in this state prescribing punishment for altering counterfeit notes on national banks. Commonwealth v. Holt, 3 Ky. Opin. 616.

§ 14. Jurisdiction.

Section 1, art. 10, ch. 28, 1 Stant. Rev. Stat., gives the courts of this state jurisdiction of the offense of passing or vending counterfeit notes purporting to be on a national bank.

Jones v. Commonwealth, 1 Ky. Opin. 531.

§ 15. Indictment or information.

§ 16.—Requisites and sufficiency.

An indictment for passing and vending counterfeit national bank notes is sufficient when it gives a general description of the denomination, bank, and to whom passed.

Jones v. Commonwealth, 1 Ky. Opin. 531.

In a charge of passing a counterfeit bill, the indictment to be good must sufficiently identify the bill so that a conviction or acquittal will be a bar to another prosecution.

Spencer v. Commonwealth, 9 Ky. Opin. 820.

The court judicially knows that United States treasury notes were issued by authority of law and current in Kentucky, and it is not necessary to allege such facts in an indictment charging one with issuing a counterfeit note.

Lashbrook v. Commonwealth, 12 Ky. Opin. 29.

It is required that an indictment for counterfeiting shall contain such a description of the coin said to be counterfeited as will bar another prosecution and enable the accused to know with reasonable certainty what he is charged with passing. It is not sufficient in an indictment for passing a counterfeit coin to charge that the accused paid and tendered "in payment of chestnuts a counterfeit coin of the half-dollar denomination" resembling the coin (commonly called) half-dollar of the United States of America.

Commonwealth v. Fields, 12 Ky. Opin. 402.

§ 18. Evidence.

The certificate of the secretary of state of Ohio was admissible, in a prosecution for offering in payment an altered bank bill, to prove that the Dayton Bank had been legally incorporated.

Mount v. Commonwealth, 1 Ky. Opin. 345.

The fact that the defendant had at or about the same time tendered in payment other altered bank bills similar in character to the altered bill for the tendering of which he was prosecuted, was competent evidence to prove guilty knowledge on his part.

Mount v. Commonwealth, 1 Ky. Opin. 345.

As against one indicted for passing counterfeit money, the court will not presume the existence of a law in a sister state authorizing the charter of banks and the issuing of paper money; since the laws of a foreign state must be pleaded or proven, and they must always be pleaded where the existence of the law is one of the essential elements of proof in determining the guilt of a party.

Spencer v. Commonwealth, 9 Ky. Opin. 820.

COUNTIES.

I. CREATION, ALTERATION, EXISTENCE, AND POLITICAL FUNCTIONS.

(D) OFFICERS AND AGENTS.

§ 68. Compensation.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

(A) PUBLIC BUILDINGS AND OTHER PROPERTY.

§ 105. Construction of buildings and other works.

§ 106. Use of property.

(B) CONTRACTS.

§ 111. Capacity to contract in general.

§ 113. Powers of county board.

§ 114. Powers of particular boards or officers.

§ 128. Performance or breach.

(C) COUNTY EXPENSES AND CHARGES AND STATUTORY LIABILITIES.

§ 132. Constitutional and statutory provisions.

§ 133. Expenses of county government in general.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

§ 154. Aid to corporations and investments in stock.

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VI. ACTIONS.

§ 208. Capacity to sue or be sued in general.

§ 221. Attachment and garnishment.

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§ 227. Appeal.

Discretion of commissioners as to issuing or refusing to issue liquor license, see Intoxicating Liquors, § 69.

Liability as stockholder in private corporation, see Corporations, § 78.

Mandating county court to make tax levy, see Mandamus, § 65.

Providing jails, see Prisons, § 1.

Right of citizens of county to appeal in name of county, see Appeal, § 148.

I. CREATION, ALTERATION, EXISTENCE, AND POLITICAL FUNCTIONS.

(D) OFFICERS AND AGENTS.

§ 68. Compensation.

The officers of a court are not entitled to a lien on the subject-matter in litigation for their fees, since their fees are against the parties, and are merely personal in their nature.

Gunnell's Curator v. Luke, 5 Ky. Opin. 626.

III. PROPERTY, CONTRACTS AND LIABILITIES.

(A) PUBLIC BUILDINGS AND OTHER PROPERTY.

§ 105. Construction of buildings and other works.

A county can not bind itself for the erection of a bridge except through the action of the levy court, evidenced by orders of record; but such court may render the county liable for extras on such bridge making the structure cost more than the original contract price, by ratifying recommendations for such extras made by its commissioners, and the county thus becomes liable to pay for such extras.

Pusey v. Meade County, 10 Ky. Opin. 293.

§ 106. Use of property.

An order of the county court which goes no further than to order the jury commissioners to collect the money loaned out, and to apply the same and other money in their hands and raised for that purpose to the payment of courthouse bonds, so far as it applies to money raised, or to be raised, and not within the commissioners' hands, means that they were to so use it when received.

Whitlock v. Champlin, 6 Ky. Opin. 507.

(B) CONTRACTS.

§ 111. Capacity to contract in general.

A county is capable of contracting and may be sued for a breach of its contract.

Crittenden County v. Conger, 11 Ky. Opin. 485.

§ 113. Powers of county board.

A county court can speak only through its orders entered of record, and its agents must trace their authority to such orders, and their rights and powers must be determined therefrom.

Commonwealth for Lawrence County Court v. Osborne, 7 Ky. Opin. 393.

§ 114. Powers of particular boards or officers.

Persons contracting with commissioners appointed to act for the county are bound at their peril to know the extent of their authority to contract.

Pusey v. Meade County, 10 Ky. Opin. 293.

§ 128. Performance or breach.

In an action for unliquidated damages for breach of a contract made with the county court, it is not necessary for the county court to make an order appointing some one to receive and receipt for the same.

Lawrence County Court v. Saylor, 7 Ky. Opin. 195.

(C) COUNTY EXPENSES AND CHARGES AND STATUTORY LIABILITIES.

§ 132. Constitutional and statutory provisions.

Under a statute providing for the removal and isolation of smallpox patients on the order of a justice of the peace, and, if such patient is unable to bear the expense of such removal, providing that it shall be borne by the county, where a patient is already in an isolated place, and a justice ordered the services of a physician, who attended such patient and furnished maintenance and medicine, and the patient is unable to pay, the county is liable for such services.

Marion County v. Everitt, 10 Ky. Opin. 706.

§ 133. Expenses of county government in general.

Where \$2,000.00 was appropriated by the county court to build a bridge, the commissioners under such order had no power to bind the county to pay more than the sum appropriated.

Webster County Court v. Yates, 8 Ky. Opin. 531.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

§ 154. Aid to corporations and investments in stock.

Where, by an act of the general assembly, the judge of N. county was empowered to make subscription to the capital stock of turnpike companies, "Provided, that such subscription shall not be made until said court shall be satisfied that an amount of capital stock sufficient to complete each mile of road to which such county subscription applies has been taken by private subscription"; the language of the statute is clear, explicit and non-mistakable, and it is an indispensable prerequisite that the court shall be satisfied that the amount of stock is sufficient, with the aid of the county subscription, to complete each mile to which such county subscription applies, has been taken by private subscription, before such subscription is valid.

Clay v. Carlisle & Jacksontown Tp. R. Co., 4 Ky. Opin. 684.

The county court has authority to subscribe for stock of a turnpike company only for the unfinished part of the road.

Berry v. Murnan, 3 Ky. Opin. 543.

The county court has the right of its own motion to submit the question of subscription by the county to the capital stock of a railroad company, to the voters of the county, and where the election is held in pursuance to the provisions of the act of incorporation, it cannot be treated as void by reason of assurances or representations made to the voters by friends of the enterprise.

Presiding Judge of Washington County Court v. Cumberland & O. R. Co., 5 Ky. Opin. 519.

Under the provisions of the Act of 1867, p. 371, and the amendment thereof of Acts 1868, p. 515, providing for the issuing of county bonds to pay a subscription to a railroad company, it is held that an election held to vote on the proposition is legal when ordered by the presiding judge of the county court without the other

members of the court being called upon, and also that, under the provisions of the amendatory act which came into force two days before such an election was held, a bare majority of all the votes cast is sufficient to authorize the county officials to subscribe for stock in such railroad company and to issue the county's bonds in payment of the subscription.

Logan County v. Caldwell, 10 Ky. Opin. 820.

Where reference is made in the law authorizing the county court to call an election to determine whether the county should subscribe for railroad stock and issue bonds, etc., it means the county court presided over by the county judge alone, and the justices of the county need not be called together for such purpose.

Cook v. Lyon County, 13 Ky. Opin. 81.

§ 160. General county funds.

The surplus funds derived by a county from the sale of railroad bonds held by it may be devoted to the use of building a county jail.

Duncan v. Madison County Court, 8 Ky. Opin. 837.

§ 161. Special funds.

Where a particular fund is raised by a levy for a particular purpose, and can not lawfully be used for any other purpose, it is not held for governmental purposes, and may be attached at the suit of a creditor.

Cook v. Lyon County, 13 Ky. Opin. 81.

§ 183. Issuance, requisites, and validity of bonds.

After levying and collecting a tax to pay interest on bonds of the county issued to take stock in a railroad company, and after obtaining from the legislature an act to authorize it to levy and collect a tax to enable it to pay such bonds before their maturity, the county is estopped from defending a suit on the bonds by alleging their invalidity because the election to determine whether they should be issued had not been called by the proper official.

Cook v. Lyon County, 13 Ky. Opin. 81.

Where a county is authorized to issue \$250,000 worth of bonds, and actually issues bonds in excess of said sum, the excess bonds are invalid; but where the court in response to a warning order to bondholders, but no actual service of notice, decrees which of the outstanding bonds are valid and which invalid, one thus served, by setting up the facts entitling him to do so, within five years, is entitled to his day in court to determine whether the bonds held by him are valid or not, and may have a retrial of such question.

Wathen v. Daviess County Court,
13 Ky. Opin. 964.

§ 189. Taxation.

§ 190.—In general.

Where a new county is created from territory which formerly belonged to another county or counties, the detached territory is not liable for taxes levied by the county from which it was detached, but only to levies by the new county.

Owsley County Court v. Lee
County Court, 6 Ky. Opin. 569.

Under § 19, Act Feb. 27, 1867, chartering a railroad company, the presiding judge of the county court comprises the court, and his authority in the matter of imposing taxes and collection of the same was derived from the legislative act, and not from any supposed delegation of power from the county court.

Monarch v. Daviess County Court,
6 Ky. Opin. 88.

§ 192. Levy for special purposes.

It is the duty of the county court to levy a sum sufficient to pay all allowed claims against the county at the time of the levy, and to require a bond from the sheriff with sureties worth double the amount of the levy for its collection and payment to the persons entitled, and upon failure to furnish the bond the court should have decreed a forfeiture of his right to longer hold the office.

Brown v. Knox County Court, 10
Ky. Opin. 912.

Where a turnpike is built under the statute authorizing the county to issue bonds and to assess taxpayers living

within one and one-half miles of the road, if any additional funds are required to complete the road they must be raised by a tax against all the taxpayers of the county, and not against those living within one and one-half miles of the road.

Concord v. Tollesboro Tpk. Co., 13
Ky. Opin. 97.

VI. ACTIONS.

§ 208. Capacity to sue or be sued in general.

One can not maintain an action against the members of the county as a county court nor against them individually, for personal liability.

Mobley v. Carter County, 12 Ky.
Opin. 485.

§ 221. Attachment and garnishment.

Means or property which is used by the county for strictly governmental purposes can not be seized by attachment or upon execution.

Cook v. Lyon County, 13 Ky. Opin.
81.

§ 222. Pleading.

In an action on a contract made with a county court, it is not necessary to allege that the contract was approved by the court, as such approval may be presumed.

Lawrence County Court v. Salyer,
7 Ky. Opin. 195.

§ 227. Appeal.

A judgment against the county for work and labor done in indexing books will be reversed, where there is no evidence to prove that an order had been made by the circuit court directing the indexes to be made, since the county court can not be compelled to pay for them unless they were so ordered.

Daviess County Court v. McFarland, 9 Ky. Opin. 637.

Under the provisions of 1 Acts 1879, p. 651, ch. 632, the county attorney may appeal to the circuit court in his own name for the use of the county, from the allowance of a claim in Lincoln county, and if judgment be rendered against him in that court he may appeal to the Court of Appeals.

Miller v. Baughman, 11 Ky. Opin.
266.

COUNTS.

Of indictment, see Indictment and Information, §§ 97, 126.

COUNTY ATTORNEY.

Compensation of, see District and Prosecuting Attorneys, § 4.

COUNTY COURT.

Appeal from judgment suspending liquor license, see Intoxicating Liquors, § 106.

Appeal from orders or judgments of, see Appeal, § 26.

Appeal from to circuit court, see Appeal, § 26.

Division of personal property, see Descent and Distribution, § 73.

Duties of judge, see Judges, § 29.

Jurisdiction of condemnation proceedings, see Eminent Domain, § 172.

Jurisdiction over orphans and poor children, see Courts, § 182.

Jurisdiction over suit by taxpayer for reimbursement for taxes paid, see Courts, § 182.

Jurisdiction to appoint guardian, see Guardian and Ward, § 8.

Mandamus to compel appointment of commissioner, see Mandamus, § 28.

Prerequisite to right of appeal from, see Appeal, § 44.

Presiding judge of, see Courts, § 182.

Transfer of cause to circuit court by agreement of parties, see Courts, § 26.

COURT COMMISSIONERS.

§ 1½. Appointment, qualification and tenure.

§ 2. Compensation and fees.

§ 3. Powers and functions in general.

§ 4. Civil jurisdiction and authority.

§ 5. Procedure in civil cases.

§ 6. Liabilities on official bond.

Allowance for services, see Appeal, § 839.

Discretion of commissioners in sale of land, see Judicial Sales, § 7.

Masters and commissioners, see Equity IX.

Reference to commissioner, see Reference, § 3.

Report and exception to, see Infants, § 73.

Report of commissioner in chancery, see Equity, § 406.

Sales by commissioner in chancery, see Judicial Sales, § 1.

§ 1½. Appointment, qualification and tenure.

Consent by the parties to a suit, to the appointment of commissioners, will not bind the defendants to an acceptance of the report awarding an unequal division of the property, nor render defendants liable for rents and improvements on the lands, as adjudged against them by the commissioners.

Outten v. Smith, 2 Ky. Opin. 349.

§ 2. Compensation and fees.

After a special commissioner has been appointed without objection by either of the parties or the regular commissioner, and his labors have been performed, acted upon and accepted, it is too late to object to his remuneration.

Smith v. Hopkins, 6 Ky. Opin. 448.

§ 3. Powers and functions in general.

It is error to include in a commissioner's report the amount of one of a series of notes given for the purchase of land where said note is not included in the petition, nor referred to in an amended pleading.

McCormick v. Morton, 1 Ky. Opin. 504.

A commissioner's report adjudging accounts between co-defendants that fails to show a credit due from one of the co-defendants to the other is erroneous.

Smith v. Robinson, 1 Ky. Opin. 197.

The report of a commissioner, though not excepted to by the defendant, is not conclusive as to flagrant errors apparent on its face or made so by comparison with the pleadings and exhibits to which it refers.

Smith v. Robinson, 1 Ky. Opin. 197.

Where a commissioner finds against a defendant contrary to the rules given by the trial judge in referring matters to the commissioner for an equalization among heirs, such part of the commissioner's report as is violative of the judgment of the presiding judge, will be set aside by the appellate court, on the face of the pleadings.

Ray v. Ray, 2 Ky. Opin. 39.

A fund coming into the hands of a commissioner, appointed by the court, is subject to the orders of the court, and unless, upon dissolving the commission, the plaintiff moved for an order of payment over to him, the relation of creditor and debtor will govern; and any off-set the debtor thus had could be used in settlement of accounts between the parties.

Sodens v. Watkins' Admr., 3 Ky. Opin. 661.

It was the duty of the commissioner to let out the work on a road, and to receive it when completed, but they had no power to order the sheriff to pay the contractor.

Adams v. Brown, 5 Ky. Opin. 32.

It is proper for the master commissioner to adopt the settlement made by the partners while both are living, as a basis of his report in settling the partnership account in a suit to settle the estate of a deceased partner.

Willis v. Rainey's Admr., 5 Ky. Opin. 714.

The mere report of a commissioner of a verbal expression of a desire on the part of appellants could not have the effect of binding them as by an agreement of record, unless the report distinctly showed the terms of the agreement.

Ashurst v. Kern's Admr., 5 Ky. Opin. 29.

§ 4. Civil jurisdiction and authority.

Before land is sold by a commissioner all liens and claims against it should be settled in the suit, in order that the purchaser may know what he is buying.

Jennings v. Turner, 2 Ky. Opin. 156.

In the absence of proof to the contrary, it will be presumed that the commissioner advertised the sale as directed by the judgment, especially when his report shows he did.

Noel v. Arnold's Exr., 2 Ky. Opin. 669.

A sale made by an administrator acting as commissioner, who was the attorney for the purchaser, coupled with the fact that the purchaser appealed to the sympathies of other bidders, can not be sustained by a court of equity.

Boyd v. Boyd, 2 Ky. Opin. 387.

Claims may be proved before a commissioner without an action to establish their validity, for in such case the claims may be as effectively questioned by exceptions to the commissioner's report as they could be by suit.

Goodnight v. Adsit, 11 Ky. Opin. 157.

§ 5. Procedure in civil cases.

Manner of making report of claims against estate stated.

Curd v. Mix, Admr., 6 Ky. Opin. 332.

Where a receiver was appointed and directed to collect certain debts due the decedent's estate, and he is sued because of his negligent loss of the debts for failure to have execution issued, the court commissioner, in making his findings of the facts, should show the acts of the administrator by giving the amount of each bill, and an inventory of the notes and accounts that came to his hands, showing which were solvent, and which insolvent, the amount realized by the receiver, the amount of the debts paid by him, and the balance due the heirs.

Jones v. Hudson, 6 Ky. Opin. 188.

A commissioner's report was held to be insufficient, and the manner of making report on the liability of a collecting agent, stated.

Barrett, Exr., v. Woods, Admr., 7 Ky. Opin. 320.

An amended report of a commissioner, which is not supported by

proof, and not itemized, should be disregarded.

Sacra v. Bohannan's Admr., 7 Ky. Opin. 548.

The confirmation of a master's report as to claims against a decedent's estate is merely interlocutory.

Sacra v. Bohannan's Admr., 7 Ky. Opin. 548.

6. Liabilities on official bond.

Although a court commissioner may be compelled to make proper payments by rule and attachment, as he is an officer of the court, this is not the rule as to the personal representative of the commissioner, since the personal representative is not an officer of the court, and must be proceeded against by action.

Stites, Exr., v. Howells, 7 Ky. Opin. 125.

COURT HOUSE.

Report of building committee, see Courts, § 72.

COURT OF APPEALS.

Appeal from circuit court, see Appeal, § 26.

Effect of set-off or counterclaim on amount in controversy, see Appeal, § 51.

Finality of judgment or order appealed from, see Appeal, § 66.

Judicial notice of papers not part of record, see Appeal, § 836.

Jurisdiction, see Appeal, II.

Jurisdiction—Amount involved, see Appeal, § 49.

Reduction of judgment by amendment or remission, see Appeal, § 62.

COURTS.

I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

§ 3. Jurisdiction of cause of action.

§ 5.—Nature and grounds of action.

§ 6.—Place of accrual of cause of action.

§ 10. Jurisdiction of the person.

§ 18.—Situation of real property.

§ 22. Consent of parties as to jurisdiction.

§ 26. Scope and extent of jurisdiction in general.

II. ESTABLISHMENT, ORGANIZATION AND PROCEDURE IN GENERAL.

(A) CREATION AND CONSTITUTION, AND COURT OFFICERS.

§ 42. Constitutional and statutory provisions.

(B) TERMS, VACATIONS, PLACE AND TIME OF HOLDING COURT, COURT HOUSES AND ACCOMMODATIONS.

§ 63. Terms in general and regular or stated terms.

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(D) RULES OF DECISION, ADJUDICATIONS, AND OPINIONS, AND RECORDS.

§ 88. Previous decisions as controlling or as precedents.

§ 91.—Decisions of higher court or court of last resort.

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§ 99. Previous decisions in same case as law of case.

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III. COURTS OF GENERAL ORIGINAL JURISDICTION.

(A) GROUNDS OF JURISDICTION IN GENERAL.

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(B) COURTS OF PARTICULAR STATES.

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VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(B) STATE COURTS AND UNITED STATES COURTS.

§ 489. Exclusive or concurrent jurisdiction.

See Clerks of Courts; Contempt; Discretion of Court; Equity; Judges; Justices of the Peace; Prohibition; Reference; Removal of Causes.

Action for fraud in having case re-docketed, see Frauds, § 39.

Court officers have no lien for fees on subject-matter of litigation, see Counties, § 68.

Jurisdiction of common-law obligations, see Bonds, § 121.

Liability for judicial opinion, see Officers, § 114.

Opening or vacating judgments, see Judgment, IX.

Power of courts over judgments, see Judgment, §§ 296, 299, 305.

I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

§ 3. Jurisdiction of cause of action.

Under Section 93, Civil Code, it was held that the circuit court had no jurisdiction to render a judgment subjecting trust property to the payment of a claim for legal services rendered the trustee and the cestui que trust in drawing the trust deed and defending the trust property against claims of creditors.

Peacock v. Turner's Exr., 7 Ky. Opin. 488.

§ 5.—Nature and grounds of action.

Where the subject of an action is mortgaged real estate and a part of it is in the county where the suit was brought, the court has jurisdiction as to the whole, although some parcels of the real estate are situated in another county.

Crickett v. Hampton's Admrs., 10 Ky. Opin. 32.

§ 6.—Place of accrual of cause of action.

The repeal of an act of the legislature will not affect existing suits commenced under jurisdiction of officers of the court created by such act.

Levy v. Ullman & Co., 2 Ky. Opin. 208.

§ 10. Jurisdiction of the person.

A person not a resident of the county is not within the jurisdiction of the court unless he is jointly bound with another defendant who was served with process in the county.

Thompson v. Johnson, 6 Ky. Opin. 251.

In the absence of a plea to the jurisdiction, it will be presumed that the party objecting resides in the county where the suit is instituted.

Foreman v. Hope Ins. Co., 5 Ky. Opin. 181.

§ 18.—Situation of real property.

When the title to real estate is involved in an action, the circuit court has jurisdiction, and there is a right of appeal from its judgment even though there is only \$13.10 involved.

Long v. Spillman, 8 Ky. Opin. 140.

Where a portion of the land in controversy is located in one county, the court in that county has jurisdiction to hear the cause.

Farmer v. Sanders, 9 Ky. Opin. 604.

§ 22. Consent of parties as to jurisdiction.

Where the circuit court has the right to entertain jurisdiction of the subject-matter of the litigation, the parties may, by agreement before judgment, transfer the cause from the quarterly to the circuit court.

Spradlin v. Pieratt, 6 Ky. Opin. 522.

The jurisdiction of the courts of this state can not be a matter of contract.

Brooklyn Life Ins. Co. v. Ott, 7 Ky. Opin. 484.

§ 26. Scope and extent of jurisdiction in general.

Where the trial of exceptions to have reports of settlements of the accounts of executors was transferred

from the county court to the circuit court by direction of the parties, the circuit court had only the jurisdiction of the county court over the subject-matter.

McGehee v. Miles, 6 Ky. Opin. 470.

II. ESTABLISHMENT, ORGANIZATION AND PROCEDURE IN GENERAL.

(A) CREATION AND CONSTITUTION, AND COURT OFFICERS.

§ 42. Constitutional and statutory provisions.

Section 1, art. 4, of the state constitution, vests the judicial power of the state in the Court of Appeals, the courts established by the Constitution, and such courts inferior to the Court of Appeals as the general assembly may establish and implies that the Legislature has power to establish all such inferior courts as it may deem proper.

Digby v. City Court of Newport, 10 Ky. Opin. 646.

(B) TERMS, VACATIONS, PLACE AND TIME OF HOLDING COURT, COURTHOUSES AND ACCOMMODATIONS.

§ 63. Terms in general and regular or stated terms.

The act fixing the commencement of the first term of court in September was a public notice to all litigants when and where their suit would be adjudicated.

Deland v. Allen, 2 Ky. Opin. 225.

§ 64. Special or extraordinary terms.

The statute authorizes the holding of special terms of court for the trial of chancery, penal or criminal causes, and, where necessary, two special terms may be held.

Shelby v. Welch, 13 Ky. Opin. 1028.

§ 72. Courthouses and courtrooms.

Where a building committee was appointed by the court for the purpose of letting a contract of a county courthouse and in pursuance thereof the committee entered into a contract with appellant's assignor, which was

approved by the court; and the work as it progressed was duly inspected by the members of the committee, and when the building was nearly completed, prepared and submitted to the court their report, recommending the acceptance of the house so far as completed; and this report was approved and adopted, and the house received as recommended; such statement of facts will not countenance a charge of fraud in the procurement of the report from the committee, and it is too late for the court to complain, after it had its agents to examine the work and approve same.

Neil v. Cumberland County Court, 1 Ky. Opin. 477.

(D) RULES OF DECISION, ADJUDICATIONS, AND OPINIONS, AND RECORDS.

§ 88. Previous decisions as controlling or as precedents.

Questions of law, although decided on doubtful practice, should ordinarily remain the law rather than be subject to constant fluctuations according to the opinion of the court as differently constituted.

Blankenship v. Bartleston & Co., 6 Ky. Opin. 158.

§ 91.—Decisions of higher court or court of last resort.

The decision of the Court of Appeals in a case may be used as authority although the decision is not published in the reports of the decisions of the court.

Daniel's Devisees v. Daniel, 5 Ky. Opin. 670.

The Court of Appeals has no power over its former decisions, and whether right or wrong, that court as well as the circuit court is bound to recognize it as the law of the case.

Abbott v. City of Newport, 5 Ky. Opin. 23.

§ 93.—Rules of property.

Where there has been a long line of judicial decisions, even though such decisions upon principle are erroneous, the public who have bought, sold and owned property thereunder secure a property right therein, and such rules

should not be changed by the judiciary, except for very urgent reasons.

Rollins v. Ballentine, 10 Ky. Opin. 139.

Where a statute has long had a certain construction given to it by the courts and to change such construction would unsettle land titles, such construction amounts to a property right and should be followed.

Smiser v. Inskeep, 13 Ky. Opin. 99.

§ 99. Previous decisions in same case as law of the case.

The Court of Appeals is without legal power to modify or change the judgment of a lower court rendered in conformity to its former opinion and mandate.

Chandler v. Riggs, 3 Ky. Opin. 77.

§ 100. Effect of reversal or overruling of previous decisions.

Where at the time legal tender notes were paid in satisfaction of a judgment, the decision of the Supreme Court of the United States was recorded as settling the rights of creditors to demand the payment of debts, in coin, created before the passage of the legal tender act, and the judgment defendant voluntarily paid off the judgment in treasury notes at their negotiable value as compared with gold, and the Supreme Court of the United States afterwards overruled the decision above referred to and held that treasury notes should be regarded as a legal tender for all debts, the overruling decision can not have the effect of reopening the transaction.

Terrell v. Wathen, 5 Ky. Opin. 697.

§ 103. Opinions.

§ 107.—Operation and effect in general.

Decisions of the Court of Appeals construing statutes, which have apparently been acquiesced in by the Legislature in the revision of the statutes, will not be disturbed.

Bradley's Exrs. v. Lyles, 7 Ky. Opin. 462.

Opinions should seldom be overruled when to do so would disturb vital rights and interests acquired upon the faith of them.

Murphy v. Boyd, 11 Ky. Opin. 817.

§ 116.—Amendment and correction.

After the adjournment of the court, whether upon petition or otherwise, it has no power to alter, change, or set aside any order or judgment made or entered by it while sitting as a court; but upon discovery of grounds for a new trial after the term at which the judgment was rendered, an application may be made to the court by petition for a new trial as provided by section 373, Civ. Code.

Albritton v. Thornton, 2 Ky. Opin. 54.

III. COURTS OF GENERAL ORIGINAL JURISDICTION.

(A) GROUNDS OF JURISDICTION IN GENERAL.

§ 118. Courts invested with general jurisdiction.

The circuit court has no right to assume jurisdiction over land not embraced in the petition, nor to appoint a commission to ascertain the rents, profits, etc., due from a defendant in possession, until an amended pleading shall have been filed charging the defendant with the use and occupation of the land.

Payne v. Houk, 2 Ky. Opin. 170.

Where B. was, on the 8th day of August, 1863, indicted in the C. Circuit Court, and admitted to bail, and appellant became bound as his surety, but failed to answer at the February term, 1864, and his recognizance was adjudged forfeited, whereupon the appellant was summoned to appear in the court at its next April term, and show cause, etc.; and in the meantime a criminal court was established for C. county to which all the criminal and penal causes and pleas of the commonwealth were transferred; and prior to the time the cause should have been moved to the criminal court no summons had been served on appellant; and on the 23d day of April, 1867, judgment was rendered against appellant in the criminal court; the criminal court had no jurisdiction in the matter as appellant was summoned to appear in the circuit court.

Williamson v. Commonwealth, 1 Ky. Opin. 573.

§ 119. Amount or value in controversy.
In an action for \$50.00 actual damages, and \$50.00 punitive damages, the amount as a whole is sufficient to give the circuit court original jurisdiction, under §§ 18, 24 and 29, Civ. Code.

Prewitt v. McElroy, 4 Ky. Opin. 399.

Where the debt after adding interest and deducting credits was less than \$50 at the time the action was begun, the circuit court was without jurisdiction.

Gray's Admr. v. Clarkson's Exr., 1 Ky. Opin. 403.

Where the payment of fifty dollars on a debt should first be applied to the discharge of the accrued interest; and, this being done, the balance remaining when credited on the principal did not reduce the amount due to fifty dollars, the Circuit Court had jurisdiction.

Rake v. Hill, 5 Ky. Opin. 570.

(B) COURTS OF PARTICULAR STATES.

§ 135. Kentucky.

Under the provisions of the Act of March 9, 1878, the Kenton Circuit Court at Independence has exclusive jurisdiction of all criminal offenses committed in Kenton county outside the corporate limits of the city of Covington and of the first Magisterial district.

Morris v. Commonwealth, 13 Ky. Opin. 87.

The Common Pleas Court can not entertain a petition to hold the officers of the bankruptcy court liable for an alleged mistake in not passing upon a litigant's claim and making distribution to him, but the claimant must secure his right in the bankruptcy court, and if he loses such right by reason of his negligence he can make no complaint.

Bird v. Moore, 13 Ky. Opin. 445.

IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

§ 167. Limitations as to amount or value in controversy.

Where, under the statute, the juris-

diction of a quarterly court is limited to fines not exceeding one hundred dollars, the acceptance of a bond for \$200.00 for a misdemeanor, returnable to said court, deprives the court of jurisdiction.

Boyer v. Commonwealth, 3 Ky. Opin. 224.

§ 174. Particular courts of special civil jurisdiction.

A county court was held to have no power to appoint a trustee of an estate in the place of one who had died, since such jurisdiction is in a court of equity.

Lowry v. Morgan, 6 Ky. Opin. 465.

§ 182. County courts and other local courts.

A county court has no jurisdiction to try a suit by a taxpayer for reimbursement for taxes paid, even upon an agreed statement of facts, nor can it be compelled to levy and pay such tax receipts in money.

Simpson County Court v. Cope-land, 3 Ky. Opin. 228.

The jurisdiction of county courts over orphans and poor children is limited, and special orders, binding children as apprentices, should state the facts required by law to give the court jurisdiction.

Allen v. Wall, 1 Ky. Opin. 587.

The judge is the presiding officer of the county court, when such court is composed of the judge and justices; and when such judge is forced to leave the presiding chair and one of the justices is put up to preside, the action of such court then taken is void and of no effect.

Day v. Sewell, 10 Ky. Opin. 510.

§ 183.—Jurisdiction.

The circuit courts have exclusive jurisdiction over judgments rendered by justices, when the amount in dispute is not less than \$10, and the quarterly court has no jurisdiction to render a judgment on appeal from a justice where the judgment is for \$10 or more.

Murphy v. Jett, 10 Ky. Opin. 735.

VI. COURTS OF APPELLATE JURISDICTION.

(B) COURTS OF PARTICULAR STATES.

§ 223. Kentucky.

The Court of Appeals' jurisdiction extends only to the final orders and judgments of inferior courts, and it can not assume jurisdiction of an order dissolving an injunction without a final judgment in the action.

White v. Dawburg, 2 Ky. Opin. 170.

Where the trial court does not, by an order or judgment, dispose of the proceeds of a sale and fix the priorities of those claiming rights therein, this court has no jurisdiction, on motion for rehearing, to pass upon the questions raised concerning such proceeds.

City Nat. Bank of Paducah v. Gardner, 12 Ky. Opin. 458.

Where it is sought in a court of equity to set aside a conveyance alleged to be fraudulent, and to subject the land to a claim not alleged to have been reduced to judgment, and execution was issued and return of nulla bona made, and the defendant does not raise the question of the jurisdiction of the trial court, it is too late to raise the question of jurisdiction for the first time in the Court of Appeals.

Walker v. Smith, 13 Ky. Opin. 365.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(B) STATE COURTS AND UNITED STATES COURTS.

§ 489. Exclusive or concurrent jurisdiction.

A plaintiff, claiming lands embraced in a boundary the adjudications of which had been finally settled in the Federal court, can not have correction of his error made in a state tribunal; as it will be necessary to correct them in the court in which the error occurred.

Proctor v. Biddle, 3 Ky. Opin. 238.

COVENANTS.

II. CONSTRUCTION AND OPERATION.

(A) COVENANTS IN GENERAL.

§ 30. Persons liable on personal covenants.

(B) COVENANTS OF TITLE.

§ 42. Covenant against incumbrances.

§ 45. Covenant of warranty.

(D) COVENANTS RUNNING WITH THE LAND.

§ 53. Covenants which may run with land in general.

III. PERFORMANCE OR BREACH.

§ 93. Covenants of title in general.

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IV. ACTIONS FOR BREACH.

§ 106. Grounds of action in general.

§ 110. Time to sue and limitations.

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§ 133. Trial.

§ 135.—Instructions.

For quiet enjoyment of leased premises, see Landlord and Tenant, §§ 130, 186.

No covenant of warranty in judicial sale, see Judicial Sales, § 50.

Of seisin and general warranty, see Deeds, § 33.

Of warranty in commissioner's deed, see Judicial Sales, § 49.

Petition for breach of covenant or bond, see Bonds, § 124.

To pay rent, see Landlord and Tenant, § 182.

II. CONSTRUCTION AND OPERATION.

(A) COVENANTS IN GENERAL.

§ 30. Persons liable on personal covenants.

A covenant by several obligors to pay certain debts out of any church funds that may come into their hands will render them personally liable for a breach thereof, where such funds were proven to have been received by them.

Redman v. Hart, Admr., 2 Ky. Opin. 527.

(B) COVENANTS OF TITLE.**§ 42. Covenant against incumbrances.**

Where one has received a conveyance of land with covenants of warranty, he has a cause of action against his grantor when a stranger successfully asserts a right of way over the land, for such assertion amounts to a breach of warranty.

Ware v. Owens, 13 Ky. Opin. 670.

§ 45. Covenant of warranty.

No breach of the covenant of warranty of title can occur until there has been an eviction, and before one can recover on account of such breach he must aver and prove that he has been evicted.

Arnold v. Maiden, 10 Ky. Opin. 288.

(D) COVENANTS RUNNING WITH THE LAND.**§ 53. Covenants which may run with land in general.**

A covenant to pay rent runs with the land and is binding on one who assumes possession of the leased premises.

Riley v. Louisville, L. & C. R. R. Co., 6 Ky. Opin. 183.

III. PERFORMANCE OR BREACH.**§ 93. Covenants of title in general.**

A defendant who enters into a covenant with one of several plaintiffs, is entitled to the benefits thereof, as to the manner and means of payment, in a suit by the plaintiffs for specific performance.

Bowman v. Norton Bros., 3 Ky. Opin. 157.

§ 94. Covenant of seisin.

Allegation and proof that one-half the land so conveyed belonged to a third party, and that title was not in the vendor at the date of the conveyance, was at once a breach of the covenant of seisin, and damages for that part could be recovered.

Fennessey v. Abbott, 4 Ky. Opin. 469.

Where a grantor having no title whatever to the land, sells and conveys it to a grantee, he is liable to the

grantee, where he has represented to him that he had title.

Arnold v. Maiden, 12 Ky. Opin. 296.

§ 99. Covenant of warranty.

To constitute a breach of the covenant of general warranty, there must be an eviction of the grantee by paramount title; but the covenant or seisin is broken at once if the title conveyed is not clear, free and unencumbered.

Fennessey v. Abbott, 5 Ky. Opin. 42.

A judgment against a vendor, in an action to recover the land, is sufficient evidence of eviction to authorize a right of action immediately for damages for breach of covenant.

Stirman's Admr. v. Hahn, 4 Ky. Opin. 515.

A deed reading: "Covenanting with the grantee, his heirs and assigns, that the title so conveyed is clear, free and unincumbered," and "that he will warrant and defend the same against all legal claims whatsoever," means first, a covenant of seisin, and second, a covenant of general warranty.

Fennessey v. Abbott, 4 Ky. Opin. 469.

IV. ACTIONS FOR BREACH.**§ 106. Grounds of action in general.**

Before a grantee under warranty can maintain an action for breach of warranty she must show that she has sustained loss; and where it appears that she has sold the land and received the money therefor, she has sustained no loss and can not recover on claim of breach of warranty.

Offutt v. Bradley, 12 Ky. Opin. 306.

§ 110. Time to sue and limitations.

One can not recover for breach of covenants of warranty until he is disturbed or the covenants are broken.

Burbanks' Admr. v. Burbanks' Admr., 8 Ky. Opin. 113.

§ 123. Damages.

The criterion of damages for breach of covenant by failure of title to one-

half the land, is one-half the amount paid for the land, with interest, the taxes paid on such part, and expenses of recording.

Fennessey v. Abbott, 4 Ky. Opin. 469.

§ 133. Trial.

§ 135.—Instructions.

In an action for breach of covenant against incumbrance, the court should by instruction direct the inquiry of the jury to the fact whether there was a lien on the identical property covered by the deed when the conveyance was made, the amount thereof, and a statement as a matter of law whether the deed contained a covenant of general warranty.

Looney v. Hauck, 6 Ky. Opin. 223.

COVERTURE.

Disabilities of, see Husband and Wife, IV.

CREDITORS.

See Debtors and Creditors.

Remedies of, see Assignments for Benefit of Creditors, V.

CREDITORS' SUIT.

§ 3. Adequate remedy at law.

§ 4.—In general.

§ 9. Conditions precedent.

§ 13.—Exhaustion of ordinary legal remedies in general.

§ 16.—Execution and return.

§ 23. Limitations and laches.

§ 24. Parties.

§ 37. Pleading.

§ 3. Adequate remedy at law.

§ 4.—In general.

A court of equity has no jurisdiction to subject land to sale to pay a judgment when the plaintiff in such an action has a complete remedy by execution on his common-law judgment, as he can not resort to equity when he has a complete legal remedy.

Smith v. Ratcliffe, 10 Ky. Opin. 737.

§ 9. Conditions precedent.

§ 13.—Exhaustion of ordinary legal remedies in general.

A proceeding to subject the defend-

ant's interest in property to pay a judgment against him can only be maintained after execution and a return of no property found, and such an execution must be directed to the county where the judgment was rendered or of the defendant's residence.

Tanner v. Howard, 10 Ky. Opin. 793.

In the absence of any lien on property, a return of nulla bona is necessary to give a court of equity jurisdiction to subject property to a debtor's claim, as no cause of action exists in equity in a cause where the creditor has failed to exhaust his common-law remedy.

Kroger v. Roger Wheel Co., 10 Ky. Opin. 900.

§ 16.—Execution and return.

A creditor who has not procured a judgment and execution and a return of nulla bona can not maintain a suit to subject property or set aside a mortgage because made in fraud of creditors.

Brewer v. Hill, 10 Ky. Opin. 30.

§ 23. Limitations and laches.

Where a petition is filed in a creditor's suit, though after the six months' limitation, and reference is made in same, to the other suits then pending for the same relief, their rights cannot be defeated by the other creditors dismissing so much of their petition as sought relief under the insolvent creditors' act.

Gordon, Harbison & Co. v. Acton, 4 Ky. Opin. 500.

§ 24. Parties.

In a creditor's suit, to subject a life estate descending to the debtor, under a will, providing that the property was to be held by the debtor for his children, but under his control and in every respect as his own, but not subject to his debts, it is held that the children were necessary parties thereto.

Litton v. Litton, Gdn., 3 Ky. Opin. 439.

In a suit to subject an interest in property to pay a judgment against the owner of such interest, all par-

ties in whom was the equitable title should be brought before the court.

Tanner v. Howard, 10 Ky. Opin. 793.

§ 37. Pleading.

An answer setting up as a ground of defense to an action by creditors that the property in question had been given to the debtor and his heirs free from his debts, is not subject to demurrer.

Stephens v. Bishop, 3 Ky. Opin. 351.

CRIMINAL COURTS.

Jurisdiction of, see Courts, § 118.

Transfer of criminal case from circuit court, see Courts, § 118.

CRIMINAL LAW.

I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

§ 28. Degrees of offenses.

§ 31. Defenses in general.

II. CAPACITY TO COMMIT AND RESPONSIBILITY FOR CRIME.

§ 47. Insanity.

§ 48.—In general.

§ 58. Persons acting under authority or direction of others.

III. PARTIES TO OFFENSES.

§ 63. Principals in second degree.

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§ 112. Offenses committed partly in one county and partly in another.

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- § 1038.—Instructions.
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(C) PROCEEDINGS FOR TRANSFER OF CAUSE, AND EFFECT THEREOF.

- § 1069. Time of taking proceedings.

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 Conviction without appearance, see Municipal Corporations, § 634.
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 Presumption as to statutes of another state, see Counterfeiting, § 18.
 Testimony of conspirator, see Witnesses, § 88.
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I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

§ 28. Degrees of offenses.

Robbery and larceny are not degrees of the same offense, but they are distinct offenses.

Griffith v. Commonwealth, 9 Ky. Opin. 513.

The statute provides that if there be a reasonable doubt of the degree of the offense committed by the defendant he shall only be convicted of the lower degree, and the court erred in refusing to so instruct the jury.

Adkins v. Commonwealth, 9 Ky. Opin. 725.

§ 31. Defenses in general.

It is no excuse for the commission of a criminal act in this state that the same act had been done in another state.

Clark v. Commonwealth, 3 Ky. Opin. 41.

II. CAPACITY TO COMMIT AND RESPONSIBILITY FOR CRIME.

§ 47. Insanity.

§ 48.—In general.

Insanity of a defendant at the time of the commission of a crime is a complete defense; and where there is evidence produced in a criminal cause that the defendant was at the time of the offense on the verge of delirium tremens, and where instructions are asked, the court should instruct the jury that if they believed from the evidence that the defendant at the time of the commission of the crime was not sane, and could not, because of mental incapacity, know right from wrong, whether that incapacity was caused by drink or not, they should acquit.

McFall v. Commonwealth, 8 Ky. Opin. 236.

Where a defendant in a criminal prosecution had been adjudged insane by a judicial inquiry shortly before the commission of the offense charged against him, and this is shown by the evidence, the burden of showing the sanity of the accused is on the prosecution, and it must prove that mental derangement had ceased to exist.

Talbott v. Commonwealth, 10 Ky. Opin. 153.

In law insanity is a generic term and embraces every case of defect of reason or weakness of mind which leaves the person without mental capacity to distinguish right from wrong or without the will power, knowing right from wrong, to control a tendency to wrong doing.

Richey v. Commonwealth, 13 Ky. Opin. 177.

§ 58. Persons acting under authority or direction of others.

There can be no agency in crime, and a landlord who was not present or directing his tenant to build a fence in a public highway can not be held guilty, since in such case the prosecution should be against the tenant.

Barnard v. Commonwealth, 8 Ky. Opin. 760.

III. PARTIES TO OFFENSES.

§ 63. Principals in second degree.

In order to convict for misdemeanor,

it is not necessary for the offender to have been the actual perpetrator of the wounding; it was only necessary that he was present, aiding and abetting the act, to make him a principal in the second degree.

Commonwealth v. Kelley, 3 Ky. Opin. 707.

§ 68. Accessories before the fact.

§ 69.—In general.

There are but two classes of accessories in crime, before the fact and after the fact, but there is no such thing known to the law as an accessory at the fact.

Wilcox v. Commonwealth, 10 Ky. Opin. 313.

There can be no accomplices in the offense of gambling, since each defendant is liable as principal.

Commonwealth v. Jones, 10 Ky. Opin. 320.

IV. JURISDICTION.

§ 84. Constitutional and statutory provisions.

The statute limiting the right of appeal to the Court of Appeals to cases where the amount involved in the judgment is less than fifty dollars, has no application to criminal cases.

Commonwealth v. May, 8 Ky. Opin. 573.

§ 102. Loss or divestiture of jurisdiction.

Where two indictments have been rendered against a defendant in a court whose jurisdiction is limited to a fine of \$100.00, taking of one bond for \$200.00 for appearance in both cases, is void, and releasing a defendant upon such a bond will operate to dismiss the proceedings against him entirely.

Boyer v. Commonwealth, 3 Ky. Opin. 224.

V. VENUE.

(A) PLACE OF BRINGING PROSECUTION.

§ 112. Offenses committed partly in one county and partly in another.

Where one steals a horse in

one county the circuit court of that county has jurisdiction of the offense.

Peters v. Commonwealth, 9 Ky. Opin. 337.

(B) CHANGE OF VENUE.

§ 129. Application.

§ 130.—Form and requisites in general.

An application for a change of venue in a criminal case must be in writing, sworn to by the defendant, and the applicant must produce and file the affidavits of at least two other credible persons not relatives nor of counsel for the defendant, and the court may hear evidence orally or by affidavit in order to determine the facts as to the credibility of the witnesses making the affidavits for the change of venue.

Taylor v. Commonwealth, 10 Ky. Opin. 480.

§ 134.—Affidavits and other proofs.

When an application is made for a change of venue in a criminal case it is the duty of the court to hear evidence produced, and from the evidence determine whether the applicant is entitled to a change of venue.

Hicks v. Commonwealth, 11 Ky. Opin. 214.

VII. FORMER JEOPARDY.

§ 161. Nature and grounds of defense.

Gen. Stats. (1881), ch. 29, art. 1, § 12, which authorizes an increased punishment for grand larceny where former convictions are alleged and proved, is not in violation of the state constitution which provides that no one shall for the same offense be twice put in jeopardy.

Taylor v. Commonwealth, 11 Ky. Opin. 642.

§ 164. Elements of former jeopardy.

§ 172.—Jury and oath.

It is not proper in any case for the court to instruct the jury that the law implies malice from any fact or facts proven.

Banks v. Commonwealth, 10 Ky. Opin. 297.

A defendant is not in legal jeopardy at the time the court, upon motion of

the state, quashed the indictment and resubmitted the charge to the grand jury, because no part of the jury had been empanelled, which must precede the reading of the indictment and statement of the defendant's plea.

Tye v. Commonwealth, 11 Ky. Opin. 206.

§ 181. Discharge of jury without verdict.

Where, after all the evidence in a criminal action for malicious prosecution was introduced, the prosecuting attorney had the jury withdrawn and the indictment dismissed, it constitutes a bar to another prosecution for the same offense.

Blair v. Meshew, 7 Ky. Opin. 103.

§ 187. Conviction.

Where there are two indictments against accused, the first charging him with stealing a horse from J. B. Simpson in October, 1872, and the other with stealing the same horse from J. B. Simpson in December, 1874, and he is tried and convicted on the second charge, such conviction is a bar to a prosecution under indictment No. 1.

Raley v. Commonwealth, 9 Ky. Opin. 189.

The plea by a defendant of former acquittal is a good defense, where the conviction for an injury to a person by assaulting and beating him denominated an intimidation and disturbance, and the second charge is for assault and battery based on the same facts and circumstances, the former offense of which he was convicted belonging to the same class of offenses, the latter being a degree of the former offense.

Offutt v. Commonwealth, 11 Ky. Opin. 287.

§ 194. Identity of offenses.

§ 197.—Offenses of which accused could have been convicted in former prosecutions.

Where in a charge against a defendant for keeping a tippling house on a specified day, the commonwealth's attorney asked the court to charge the jury that a selling at any time within the year constituted the offense, and the charge was given

and the defendant convicted, the verdict and conviction may be pleaded in bar to a prosecution under another indictment for the same offense at another time during the same period covered by the court's charge.

Roy v. Commonwealth, 9 Ky. Opin. 572.

VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT AND SUMMARY TRIAL.

§ 240. Holding accused to answer.

After hearing all the evidence, and entering upon its judgment, fixing the amount of bail, and committing the accused to jail, the examining court, has discharged all its duties, and its jurisdiction terminates by operation of law.

Holt v. Commonwealth, 4 Ky. Opin. 143.

IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

§ 266. Refusal or failure to plead.

Where there has been no plea to the indictment before the trial in the circuit court, and no objection made because of such omission, the case will be treated in the Court of Appeals as if the plea had been made.

Barnard v. Commonwealth, 8 Ky. Opin. 760.

§ 298. Plea of former jeopardy or former acquittal or conviction.

Where the accused in a criminal case is placed upon trial before a jury sworn to try the issue raised by his plea of not guilty to a valid indictment, his acquittal is a complete bar to a further prosecution but the accused should plead former acquittal instead of moving for his discharge.

Commonwealth v. Daniel, 9 Ky. Opin. 96.

Evidence of a former acquittal in a criminal case is inadmissible where the plea of former acquittal had not been properly entered, the only record of such a plea being "This day came

the defendant and entered a plea of not guilty and former acquittal."

Chambers v. Commonwealth, 10 Ky. Opin. 540.

§ 290.—Nature and necessity.

Where the jury is sworn to try a criminal case before the defendant is arraigned or enters his plea, and after motion is made for the discharge of the accused because once in jeopardy, and it is overruled, and the accused is arraigned and enters his plea of not guilty, and the jury is resworn, and at the termination of the trial the jury find him guilty, the failure to have him plead to the charge before the jury was first sworn did not harm him, and will not amount to being twice placed in jeopardy for one offense.

Minor v. Commonwealth, 12 Ky. Opin. 211.

§ 292.—Requisites and sufficiency.

A plea of former jeopardy is insufficient when it does not show that the indictment dismissed in pursuance to the court's mandate was a legally sufficient indictment, since one could not have been in legal jeopardy unless his former trial was upon a good indictment for the same offense.

Warmouth v. Commonwealth, 12 Ky. Opin. 387.

§ 303. Discontinuance.

The mere filing away of an indictment is not a dismissal of the prosecution.

Botts v. Commonwealth, 4 Ky. Opin. 610.

X. EVIDENCE.

(A) JUDICIAL NOTICE, PRESUMPTIONS, AND BURDEN OF PROOF.

§ 326. Burden of proof.

The burden is on the commonwealth to establish the guilt of the party accused of the crime.

Commonwealth v. Finnell, 7 Ky. Opin. 196.

§ 327.—Extent of burden on prosecution.

Where the evidence on the part of the commonwealth, or that offered

both by the commonwealth and accused, relates to what took place at the time the alleged offense was committed, or arises out of the circumstances attending it, the burden is on the prosecution.

Moore v. Commonwealth, 7 Ky. Opin. 218.

(B) FACTS IN ISSUE AND RELEVANT TO ISSUES, AND RES GESTAE.

§ 351. Subsequent conditions or conduct of accused.

In a criminal case where the defendant was charged with the larceny of a watch, it was error for the court to refuse to permit the defendant to prove that before he knew he was suspected of the crime, he exhibited the watch to persons and inquired of them whether they had lost it and whether they knew to whom it belonged, and stated to them that he had just picked it up in the yard and desired to find the owner.

Branham v. Commonwealth, 8 Ky. Opin. 581.

§ 362. Res gestae.

§ 363.—Relation to offense in general.

Declarations to be admissible as part of the res gestae must be contemporaneous with the fact; yet when they are connected with or grow out of it, they may even when made after a lapse of time be admissible.

Galloway v. Commonwealth, 11 Ky. Opin. 951.

The declarations of the participants in an act which accompany it and serve to explain or qualify it are admissible in testimony as a part of the res gestae but the statement of a bystander is inadmissible.

French v. Commonwealth, 13 Ky. Opin. 1040.

§ 364.—Acts and statements of accused.

Declarations made to a witness by the accused about five minutes after the shooting are not admissible as a part of the res gestae; the declaration was a mere narrative of a then past event, and was incompetent.

Gale v. Commonwealth, 10 Ky. Opin. 301.

On the trial of an accused person for murder a statement made by him a few minutes after the killing, near the place and in hearing and presence of witnesses not called by the commonwealth, is admissible for the prisoner as part of the *res gestae*.

Galloway v. Commonwealth, 11 Ky. Opin. 951.

A declaration of one accused of murder, who is a deputy marshal, made a few minutes prior to his attempt to arrest a person, to the effect that he was starting to make an arrest, is admissible as a part of the *res gestae* when in trying to make such arrest the accused took life.

Forman v. Commonwealth, 13 Ky. Opin. 1021.

§ 368.—Acts and statements of third persons.

A person charged with the commission of a crime may establish his innocence by showing its commission by another, but he can not exonerate himself by showing that another person, when charged with the offense failed to deny his guilt, or by proving conversations or admissions made by another.

Bowman v. Commonwealth, 7 Ky. Opin. 656.

(C) OTHER OFFENSES, AND CHARACTER OF ACCUSED.

§ 374. Proof and effect of other offenses.

In a murder trial, where the defendant is charged with killing one person, evidence is not admissible showing that the defendant also killed another person, where not admissible as a part of the *res gestae*.

Highly v. Commonwealth, 8 Ky. Opin. 579.

§ 375. Character or reputation of accused.

The commonwealth can not call witnesses to establish the general bad reputation of one on trial for murder; but where such witnesses are called by the accused to establish the deceased's bad reputation the commonwealth's attorney upon cross-examination has the right to interrogate the witnesses with a view of determining

the weight and value of their testimony.

Downey v. Commonwealth, 13 Ky. Opin. 999.

§ 379.—General reputation.

Evidence having been introduced as to the character of a witness at the trial in a criminal case, at the time of the trial, it is competent to prove by a witness what the character was two or three years prior to the trial.

Wilson v. Commonwealth, 10 Ky. Opin. 503.

(D) MATERIALITY AND COMPETENCY IN GENERAL.

§ 382. Materiality in general.

Conversations between the plaintiff and a witness of defendant, which was brought out at the trial by defendant, are competent evidence.

Rhodus v. Ogg, 1 Ky. Opin. 436.

§ 385. Competency in general.

Where two witnesses in a case in which the accused is charged with larceny, swear that they were present in the room where the larceny is charged to have been committed, and the commonwealth brings on the stand the prosecuting witness, who in rebuttal is allowed to testify that neither of the two witnesses were in the room, the defense should be permitted to show by a third witness, who claims to have been in the room at the time, that said two witnesses for the defense were in the room at the time the larceny is charged to have been committed.

Lockhard v. Commonwealth, 13 Ky. Opin. 630.

(F) ADMISSIONS, DECLARATIONS, AND HEARSAY.

§ 405. Admissions by accused.

§ 406.—In general.

The evidence of a witness who details all of a conversation which he can recollect is admissible, and while the adversary is entitled to prove all of such conversation, his inability or failure to do so will not render the part given inadmissible.

Adkins v. Commonwealth, 9 Ky. Opin. 467.

When a confession is made through the influence of hope or fear applied by a third person to the prisoner's mind, it is not admissible as evidence against him; and if a confession is obtained under inducements offered by those having the prisoner in custody it is inadmissible as evidence.

Moore v. Commonwealth, 9 Ky. Opin. 719.

§ 411. Declarations by accused.

§ 412.—In general.

Where the commonwealth in a criminal case has proven a part of a conversation, the defendant has a right to prove the entire conversation.

Shipp v. Commonwealth, 8 Ky. Opin. 652.

Where the commonwealth in a criminal case introduces a part of a conversation had with the defendant, the defense has the right to give the whole of the conversation and to explain it fully.

Greenwade v. Commonwealth, 10 Ky. Opin. 127.

§ 419. Hearsay in general.

At the trial of one charged with burglary, a woman who was in the house entered by the burglar was permitted to testify that her son, who was not used as a witness, when he saw the burglar in the house said to him, "What are you doing here, Henry French" (the same French on trial); and it was held to be error because the son's statement was mere hearsay, coming from the mother and was not a part of the *res gestae*.

French v. Commonwealth, 13 Ky. Opin. 1040.

(G) ACTS AND DECLARATIONS OF CONSPIRATORS AND CO-DEFENDANTS.

§ 422. Grounds of admissibility in general.

Where two persons are jointly indicted and tried together, and each convicted of the same offense, but the evidence fails to show that the conspiracy charged in the indictment did, in fact, exist, it is error for the trial court to refuse to permit each to

testify on the trial as a witness; since to deprive a person charged with a criminal offense of the testimony of one jointly indicted with him, it should be made to reasonably appear from the evidence of the whole case that such conspiracy existed.

Sparks v. Commonwealth, 13 Ky. Opin. 110.

(I) OPINION EVIDENCE.

§ 448. Conclusions and matters of opinion or facts.

It is a general rule that non-expert witnesses are not permitted to give their opinions as evidence, but witnesses may testify to the result of their observations made at the time in regard to common appearances or facts, and a condition of things which can not be reproduced and made palpable to the jury.

Kennedy v. Commonwealth, 10 Ky. Opin. 95.

In the trial of a homicide case, it is not error for the court to refuse to permit evidence to be introduced showing what a witness thought certain actions of the deceased's meant when such thoughts were not communicated to the accused, since the secret workings of a witness' mind are not evidence.

Mays v. Commonwealth, 12 Ky. Opin. 670.

§ 482. Examination of experts.

§ 483.—In general.

Medical practitioners, having made a post-mortem examination, are competent to give their opinions as to the probable effect of an injury which they describe to the jury as having been inflicted upon the deceased charged in a murder case to have been killed by the defendant.

Rowlett v. Commonwealth, 11 Ky. Opin. 571.

§ 485.—Hypothetical questions and answers.

Generally speaking a hypothetical question must be based upon proven facts only, but the object is to elucidate the truth, and it is not so technical as to require that the exact language of witnesses who have testified to the facts upon which the ques-

tion is based shall be used, but such questions may be based upon any state of facts which any of the evidence sustains.

Davis v. Commonwealth, 13 Ky. Opin. 329.

(J) TESTIMONY OF ACCOMPLICES AND CODEFENDANTS.

§ 509. Corroboration of accomplice.

A conviction can not be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof.

Adams v. Commonwealth, 13 Ky. Opin. 861.

(K) CONFESSIONS.

§ 517. Admissibility in general.

Evidence of a witness is admissible when it shows so much of a conversation of the defendant in a murder trial as can be remembered by the witness, amounting to confession of guilt; and the fact that the witness can not remember all that was said does not render inadmissible what he does remember of the conversation.

Berry v. Commonwealth, 8 Ky. Opin. 856.

Voluntary confessions should be allowed to go to the jury; to exclude confessions from being admitted as evidence it should be made to appear to the court that the motive of hope or fear must have been directly applied by a third person to induce them, and must have been sufficient in the judgment of the court to overcome the mind of the prisoner, to render the confession unworthy of credit.

Taylor v. Commonwealth, 9 Ky. Opin. 401.

§ 520. Promises or other inducements.

A confession in a criminal case obtained by the hope of immunity from punishment held out to the accused is not admissible as evidence against him.

Smith v. Commonwealth, 10 Ky. Opin. 261.

§ 522. Threats and fear.

Where a confession of crime is induced by fear, it is not admissible in evidence, and if the officer said to the accused after arrest that "You had better confess it" and the prisoner, being a timid and weak minded person, construed this as a threat and made a confession, such confession should not be admitted in evidence.

McDoyle v. Commonwealth, 10 Ky. Opin. 150.

(L) EVIDENCE AT PRELIMINARY EXAMINATION OR AT FORMER TRIAL.

§ 539. Necessity and admissibility of proof of preliminary proceedings in general.

Where accused gave incriminating testimony before an examining court, the commonwealth may afterwards prove the statements made by him before the examining court, to sustain the charge of the indictment.

Commonwealth v. Bengel, 7 Ky. Opin. 408.

(M) WEIGHT AND SUFFICIENCY.

§ 552. Circumstantial evidence.

It is competent for the commonwealth to prove the size of the tracks found, the size of the boots worn by the accused, and any fact which tended to show the correspondence in the size between the tracks and the boots, and it was for the jury to determine the value of such proof when made.

Babbitt v. Commonwealth of Ky. 5 Ky. Opin. 522.

Where in a trial for burglary circumstantial evidence alone is relied upon by the prosecution, it is not enough to show that the accused stated when arrested that the goods charged to be stolen could be found at a designated place, his knowledge concerning the location of the goods forms but one link in the chain, and before the accused could be convicted it was necessary to connect this fact with the house alleged to have been broken, and that, too, at the time when the breaking occurred.

Williams v. Commonwealth, 10 Ky. Opin. 245.

§ 554. Testimony or statement of accused.

Proof of confession made to one witness alone is evidence which should be carefully scanned, but the confession if freely made and satisfactorily proved is entitled to great weight.

Buckner v. Commonwealth, 4 Ky. Opin. 646.

It is not error to refuse to instruct the jury that a confession made alone to one witness constitutes the weakest evidence admissible in law.

Buckner v. Commonwealth, 4 Ky. Opin. 646.

§ 561. Reasonable doubt.

The jury have no right to weigh the evidence in a criminal case, and they have no right to weigh the testimony of any single witness; but if they have a doubt as to the credibility of a witness this doubt must be resolved in favor of the accused.

Bauman v. Commonwealth, 4 Ky. Opin. 613.

In prosecutions for misdemeanors, as well as felonies, the accused should not be convicted on a preponderance of testimony if the jury have a reasonable doubt of the guilt of the accused.

Adams v. Commonwealth, 4 Ky. Opin. 608.

XI. TIME OF TRIAL AND CONTINUANCE.**§ 576. Discharge of accused for delay.**

The mere verbal direction of the trial judge to discharge the prisoner does not discharge him, since this can only be done by an order of record.

Raney v. Commonwealth, 10 Ky. Opin. 930.

§ 583. Right of accused to continuance.**§ 584.—In general.**

Where a continuance is applied for by a defendant in a criminal case the applicant must act candidly in his dealing with the court, and where from the statements in such an application there is a doubt of good faith, the court is justified in refusing the application.

Halsey v. Commonwealth, 10 Ky. Opin. 862.

§ 587. Successive applications.

The fact that a criminal cause is set for trial on a certain day by consent of the defendant, does not amount to a waiver on his part of his right to apply for a continuance.

Scott v. Commonwealth, 9 Ky. Opin. 835.

§ 588. Grounds for continuance.**§ 592.—Absence of party.**

The accused in a murder charge, having failed to cause a witness to be recognized or summoned to appear at the trial, is not entitled to a continuance on account of his absence when the case is called for trial.

Rainwater v. Commonwealth, 12 Ky. Opin. 212.

§ 593.—Absence of counsel.

A continuance should not be granted of a criminal trial on account of the absence of the attorney of the accused unless it is made to appear that the ends of justice require the presence at the trial of the particular person selected by the defendant as his counsel.

Brown v. Commonwealth, 13 Ky. Opin. 838.

§ 594.—Absence of witness or evidence in general.

The court, on a proper application of a defendant in a criminal case, should continue the cause, where an important witness for the defense is absent without the fault of the defendant, and whose presence may be secured at a later date, especially where the defendant has been diligent in his efforts to have such witness present at the trial.

Maupin v. Commonwealth, 10 Ky. Opin. 310.

Upon the filing of an affidavit for the continuance of the trial of a criminal case, which is sufficient to show a good cause therefor on account of the absence of witnesses, it is within the sound discretion of the court to say for what length of time the cause should be postponed.

Gambrel v. Commonwealth, 10 Ky. Opin. 473.

An application for a continuance of a trial in a murder case, showing the names of absent witnesses and that

their testimony was material, and facts showing that their presence may be procured in a reasonable time at the trial, and which shows reasonable diligence in procuring their attendance under the circumstances, if sworn to should be granted.

Halsey v. Commonwealth, 10 Ky. Opin. 671.

It is not error to overrule an application for a continuance of a murder trial made by the accused to another term of the court, when much less time would be required to prepare his defense; nor is it error to refuse an application for a continuance on account of an absent witness where it does not appear that the facts sought to be proven by him are material, and where the accused is not injured in his defense by the fact that such witness does not attend or testify.

Venderhide v. Commonwealth, 10 Ky. Opin. 935.

A continuance of the trial is authorized on account of the absence of a witness, where the materiality of such testimony is shown and due diligence has been used to procure the witness, unless the attorney for the commonwealth admits upon the trial that the facts which the affiant states will be proven by the witness are true, and having admitted this he can not impeach such witness' general character or contradict such fact.

Mackey v. Commonwealth, 11 Ky. Opin. 209.

Where an indictment in a criminal case was returned August 17, and the defendant was arrested on the same day, and the case was set for trial on August 23, and the defendant had subpoenas for his witnesses issued returnable August 23, but none of them appeared, on his application for a continuance the court should have continued the cause, especially where the charge was that the defendant detained his own daughter against her will for the purpose of having carnal knowledge with her, and it is shown that one of defendant's witnesses was sick and the other not in the county.

Gillam v. Commonwealth, 12 Ky. Opin. 328.

A continuance of a criminal cause will not be granted on account of absent witnesses where the accused does not know where the witnesses may be found, and when he fails to exhibit facts showing even a probability of ascertaining where the witnesses are or that their attendance could be procured if the cause should be continued.

Smith v. Commonwealth, 12 Ky. Opin. 548.

In view of the facts shown by the opinion in this case, it was held that the defendant was not entitled to a continuance at his trial in order to procure evidence to show that the girl upon whom he committed rape was an unchaste woman.

Prewitt v. Commonwealth, 12 Ky. Opin. 610.

It is the duty of the court trying a criminal case to grant a continuance on account of the absence of a witness material for the defense, but an application for such a continuance should be denied when it does not appear that due diligence has been used to procure his attendance and that there is reasonable grounds to believe that such attendance can be had at the next term. Due diligence is not shown when a witness is recognized to appear and does not do so and no effort is made to attach him.

Galloway v. Commonwealth, 13 Ky. Opin. 428.

An application for a continuance of a murder trial, on account of the absence of a witness, should be denied, even though he has shown diligence and the evidence is material, when no reasonable probability that the attendance of the witness can be procured is shown.

Rankin v. Commonwealth, 13 Ky. Opin. 585.

In the trial of one charged with murder it is error to refuse him a continuance upon his application showing diligence, that the evidence of such witness was material, and that the witness could be procured at another time, where the application was made in good faith and not for mere delay.

Forman v. Commonwealth, 13 Ky. Opin. 1021.

§ 595.—Competency or materiality of expected evidence.

A continuance of a criminal trial will not be granted to enable the accused to produce immaterial evidence.

Neal v. Commonwealth, 13 Ky. Opin. 70.

§ 596.—Cumulative or impeaching evidence.

Where a criminal cause has been several times continued on the application of the defendant, it should not again be continued upon such application because of the absence of an additional impeaching witness.

Scott v. Commonwealth, 13 Ky. Opin. 763.

No continuance will be granted to a defendant in a criminal cause on account of an absent witness where it appears that the evidence sought from him is merely cumulative.

Fowler v. Commonwealth, 13 Ky. Opin. 853.

§ 598.—Diligence.

Where on the day set for trial of a criminal case, the defendant files his affidavit for a continuance, stating that certain persons residing in the county were important witnesses for him, and the facts he expected to prove by them, and such facts are material ones, such cause should be continued, unless there was such want of diligence on his part as to deprive him of the right.

Scott v. Commonwealth, 9 Ky. Opin. 835.

Where two are jointly indicted, the due diligence of one in securing evidence and preparing for trial necessary to secure a continuance may rightly be relied upon by the other in his application for a continuance where the same evidence exists as to both.

Walker v. Commonwealth, 12 Ky. Opin. 604.

Before a continuance will be granted on the application of one charged with crime, the application must show diligence to get the witness, that there is a probability that he can be had, and that the facts he will testify to

are material and not merely cumulative.

Brumback v. Commonwealth, 13 Ky. Opin. 818.

It is not error for the trial court to refuse a continuance of a criminal trial on an application showing that a witness is absent, where diligence is not shown to have been used to procure the attendance of the witness.

Brown v. Commonwealth, 13 Ky. Opin. 838.

Even though an application for a continuance by a defendant in a criminal cause shows that he has used diligence to procure an absent witness and that he may at another time be procured to attend, the continuance will not be granted where the evidence of such witness is not material to the defense, and the defendant was not prejudiced by the refusal to grant the continuance.

Spradlin v. Commonwealth, 13 Ky. Opin. 846.

§ 600. Admissions to prevent continuance.

Where counsel for the commonwealth in a murder case admits the truth of statements in an affidavit for continuance, as to what the absent witness would testify to, the application for continuance should be denied.

Shackelford v. Commonwealth, 12 Ky. Opin. 266.

No continuance of a criminal cause shall be granted on the application of the defendant on account of the absence of a witness if the attorney for the commonwealth admits as true what the defendant has stated in his affidavit the absent witness will prove.

Davis v. Commonwealth, 13 Ky. Opin. 329.

§ 602. Application and affidavits for continuance.**§ 603.—In general.**

The affidavit for a continuance in a criminal trial on account of the absence of a witness will be denied where the affidavit fails to state the facts which such witness will testify to, but states only conclusions, since such evidence would be incompetent if the witness was present.

Duncan v. Commonwealth, 13 Ky. Opin. 144.

The affidavit by a defendant in a criminal cause for a continuance on account of absent witnesses will be refused where an application fails to show what the witness would swear to or that his testimony is as to a material matter, or facts showing diligence on the part of the applicant to procure the witnesses' attendance or that the attendance can be had if the cause is continued.

Davis v. Commonwealth, 13 Ky. Opin. 329.

An application for a continuance of a criminal trial on account of the absence of a witness should be denied when it fails to show a reasonable probability that the attendance of such witness can be secured if the cause be continued, and the mere statement in the application that the witness has promised to attend is not a sufficient showing of even a probability that such attendance could be had.

Wing v. Commonwealth, 13 Ky. Opin. 565.

XII. TRIAL.

(A) PRELIMINARY PROCEEDINGS.

§ 618. Condition of prosecution in general.

Within the meaning of the criminal code, a trial is not over until the motion for a new trial is overruled and the sentence is passed.

Cain v. Commonwealth, 10 Ky. Opin. 215.

§ 622. Separate trial of codefendants.

Where two persons are jointly indicted and one asks for a separate trial, the commonwealth has the right to select which of the two shall be first tried.

Raske v. Commonwealth, 10 Ky. Opin. 965.

(B) COURSE AND CONDUCT OF TRIAL IN GENERAL.

§ 633. Regulation in general.

A criminal trial held after January 1, 1877, should have been conducted in all respects according to the provisions of the Code of 1877, notwith-

standing the offense may have been committed prior to that time.

Shipp v. Commonwealth, 9 Ky. Opin. 463.

§ 636. Presence of accused.

A return on a *capias pro fine* showing that the party can not be found, can not be impeached by proving, *aliunde*, that he might have been found.

Lyon v. Commonwealth, 7 Ky. Opin. 709.

(C) RECEPTION OF EVIDENCE.

§ 662. Right of accused to confront witnesses.

While one accused of crime has the constitutional right to face his accusers, if one of his own witnesses is absent, but makes an affidavit in favor of the defense, and the defendant asks to have it read in evidence, and the prosecutor agrees to permit it to save the necessity of a continuance, the defendant can not after conviction claim a reversal because of his right to face the witnesses.

Taylor v. Commonwealth, 12 Ky. Opin. 625.

§ 665. Separation and exclusion of witnesses.

Where a witness for the defense in a criminal case is offered, and excluded because he has remained in the courtroom and heard all the evidence, while the court had directed the witnesses to be separated and to remain out of the room until called as witnesses, and the record does not show that the defendant excepted to the ruling of the court or objected thereto, the question is not presented to the Court of Appeals because no objection or exception was taken to the court's ruling.

Sellards v. Commonwealth, 12 Ky. Opin. 319.

§ 678. Election between acts.

In the trial of one charged with arson on March 10, the commonwealth can not be held to have elected to try the defendant on a similar charge of January 14, by merely showing as a circumstance his con-

nection with such acts on the former date.

Chenowith v. Commonwealth, 13 Ky. Opin. 1127.

§ 680. Order of proof in general.

The trial court has a wide discretion in the matter of the order in which evidence is introduced in the trial of a criminal case, and this court will not reverse unless manifest abuse of such discretion is shown.

Walker v. Commonwealth, 13 Ky. Opin. 508.

The ends of justice require that the court shall have a wide discretion in respect to the order of the introduction of evidence in a criminal trial, and such discretion will only be interfered with by the Court of Appeals when manifestly abused and the substantial rights of the accused party prejudiced.

Jackson & Moss v. Commonwealth, 13 Ky. Opin. 558.

(E) ARGUMENTS AND CONDUCT OF COUNSEL.

§ 702. Scope and effect of opening statement.

§ 704.—For defense.

In the trial of a criminal cause, the defendant has the right through his attorney to state the nature of his defense and the evidence he intends to offer to sustain it, and in doing so he may be permitted to refer to the evidence of the prosecution, and explain how he expects to overcome it; but he may not comment upon the evidence of the prosecution further than is necessary to enable the jury to understand what parts of it are to be assailed by his evidence.

Scott v. Commonwealth, 9 Ky. Opin. 835.

§ 708. Scope and effect of summing up.

§ 709.—For prosecution.

When remarks are made by the attorney for the commonwealth in argument to the jury which might be prejudicial to the accused; and on objection by the accused the court sustained the objection and stated in the presence of the jury that the remarks were improper, the Court of Appeals can not conclude that the remarks

were prejudicial to the accused or that they influenced the jury against him.

Taylor v. Commonwealth, 12 Ky. Opin. 233.

Where a defendant in a criminal case has a legal opportunity of strengthening or explaining a fact in the case and fails to avail himself of it, or to show his inability to do so, it is not error for the commonwealth's attorney to refer to such failure in argument, but such attorney in such argument has no right to allude to the fact that the defendant had other indictments pending against him nor to his former appearances in court.

Sellards v. Commonwealth, 12 Ky. Opin. 319.

§ 711. Limiting scope or time of argument.

In a trial of a murder case the trial court has a large discretion as to limiting the time for argument and the Court of Appeals will not reverse except for a gross abuse of such discretion.

Sewell v. Commonwealth, 11 Ky. Opin. 213.

§ 728. Objections and exceptions.

Where the commonwealth's attorney makes improper statements in his argument to the jury, they should be objected to at the time; and where no objection is made, the defendant can not urge the error in order to secure a new trial.

Taylor v. Commonwealth, 12 Ky. Opin. 625.

Where no objection is made or exception is taken to statements made by the commonwealth's attorney in argument to the jury, at the time the statements were made, the question can not be raised for the first time in the Court of Appeals.

Sugg v. Commonwealth, 12 Ky. Opin. 638.

(F) PROVINCE OF COURT AND JURY.

§ 733. Question of law or of fact.

§ 734.—Questions of law in general.

Where one who claims to be a deputy marshal is on trial for mur-

der and is shown to have taken a life in an effort to make an arrest, the question of whether he was at the time such deputy, is one of law for the court to determine, and it is error in such trial for the court to charge the jury that it must determine the question.

Forman v. Commonwealth, 13 Ky. Opin. 1021.

§ 741.—Weight and sufficiency of evidence in general.

It is not the province of the court to weigh the testimony in a criminal case or to take from the jury the consideration of any fact proven in the case essential to the defense.

Pulliam v. Commonwealth, 13 Ky. Opin. 13.

§ 753. Direction of verdict.

Where the averments of an indictment are not supported by the evidence the court should instruct for defendant.

Lee v. Commonwealth, 1 Ky. Opin. 243.

Where the only testimony against a defendant is an alleged confession made to an accomplice, the evidence is very unsatisfactory, and the court should have instructed the jury to find for the defendant.

Waddell v. Commonwealth, 9 Ky. Opin. 790.

§ 754. Instructions invading province of jury.

§ 757.—Credibility of accused.

In a criminal case, the trial court should withhold instructions upon matters relating to the credibility of witnesses and the weight of evidence, or the rules by which the jury should be governed in passing upon either.

Stewart v. Commonwealth, 9 Ky. Opin. 793.

In a case where the accused is indicted for malicious shooting and wounding another, and there were witnesses present, and all of the evidence shows that the accused shot the prosecuting witness in the back without such witness even knowing of his presence, it is not error for the trial court to refuse to instruct the jury as to the legal effect of crime

committed under sudden heat and passion.

Shoomaker v. Commonwealth, 9 Ky. Opin. 446.

(G) NECESSITY, REQUISITES, AND SUFFICIENCY OF INSTRUCTIONS.

§ 769. Duty of judge in general.

An instruction in a criminal case should be so plain as to leave no room for contention as to its meaning and should not contain any statement calculated to confuse or mislead the jury.

Michael Moore v. Commonwealth, 7 Ky. Opin. 218.

It is the duty of the court to instruct the jury in a criminal case on the law applicable to the case, but he is not required to instruct either as to an offense for which the defendant could not be convicted under the indictment or on an assumption of fact without evidence to support it.

Sosh v. Commonwealth, 11 Ky. Opin. 710.

§ 770. Issues and theories of case in general.

When the accused relies on a plea of self-defense, and there is any testimony tending to establish his plea, however slight, the court should give an instruction covering the law of self-defense.

Bauman v. Commonwealth, 4 Ky. Opin. 613.

It is the duty of the trial court to instruct the jury upon all the law of the case whether such instructions are asked or not, but he is not required to instruct as to any law not applicable to evidence given.

Sexton v. Commonwealth, 13 Ky. Opin. 148.

§ 772. Elements and incidents of offense, and defenses in general.

An instruction on self-defense is faulty where it does not allow the jury to determine the apparent danger as it appeared to the defendant, who had a right to act reasonably upon such appearances.

Mace v. Commonwealth, 12 Ky. Opin. 490.

Under § 1, art. 17, Gen. Stat., providing that to reduce the expense of

malicious cutting and stabbing to a misdemeanor it is only required that the offense should have been committed "in a sudden affray or in sudden heat and passion and without previous malice," an instruction attempting to add to such requirement by charging that to reduce such crime it must appear that the cutting was done "in sudden heat and passion caused by considerable provocation, such as a blow or actual trespass," is misleading and erroneous.

Baker v. Commonwealth, 13 Ky. Opin. 146.

§ 773. Insanity.

The mere fact that a person charged with crime had been an excessive drinker for a number of years is not such evidence of insanity requiring the court to instruct the jury on that subject, especially where the evidence showed that at the time of the commission of the crime such defendant was able to discriminate between right and wrong.

Jones v. Commonwealth, 9 Ky. Opin. 444.

In the trial of a criminal cause, where the defense is insanity of the accused at the time the crime was committed, the following instruction was held not to be erroneous: "The court instructs the jury that if they believe from the evidence that at the time the defendant cut and stabbed W. M. Combs, if he did cut and stab him, he did not at the time have sufficient reason to know right from wrong, and did not have sufficient will power or control to govern his actions, then the jury will acquit the defendant upon the plea and grounds of insanity of mind."

Hardwick v. Commonwealth, 13 Ky. Opin. 760.

§ 780. Testimony of accomplices.

In the trial of one charged with larceny, where an accomplice testifies on the trial in behalf of the commonwealth, it is the duty of the court to instruct the jury as to the weight and consideration to be given to his testimony under the Criminal Code, 1876, § 241.

Adams v. Commonwealth, 13 Ky. Opin. 861.

§ 782. Determination of sufficiency of evidence in general.

In a criminal case, it is error for the court to instruct the jury to consider all the facts and circumstances which the court has permitted as evidence "and which may be satisfactorily proved;" it being the duty of a jury to consider all the facts and circumstances which the proof tends to establish whether they were satisfactorily proved or not.

O'Conner v. Commonwealth, 9 Ky. Opin. 143.

Where there is evidence tending to show that the accused in a criminal case charged with cutting another was acting in self-defense, the court should instruct the jury on the law of self-defense.

Jones v. Commonwealth, 9 Ky. Opin. 444.

§ 783½. Excluding evidence from consideration.

Where the exclusion of testimony, though it be properly excluded, may have impressed the jury improperly, the circumstance requires some explanation to the jury on the subject so that it may not be wrongly impressed, and they may understand its bearing.

Greer v. Commonwealth, 10 Ky. Opin. 664.

§ 784. Circumstantial evidence.

In the trial of one charged with murder, where the evidence is largely circumstantial, the trial court is not required to caution the jury against a verdict based upon circumstantial evidence or to prescribe a rule by which that kind of evidence is to be considered by the jury.

Strickler v. Commonwealth, 13 Ky. Opin. 551.

§ 785. Credibility of witnesses.

An instruction that it is the province of the jury to pass upon the credibility of each witness, and that if a witness swears falsely in relation to one particular fact, the jury may disregard every other fact testified to by him, is a correct statement of the law.

Samuel Crawford v. Commonwealth, 7 Ky. Opin. 494.

The jury are the judges of the credibility of the witnesses and it is error for the court in his instruction to indicate any particular test of credibility to the jury or to instruct or indicate that if a witness has willfully and corruptly sworn falsely as to any material fact they may disregard the whole of his evidence, and a particular conclusion, based upon a single supposed fact, should not be pointed out to the jury as one that they may come to.

Cook v. Commonwealth, 11 Ky. Opin. 676.

In the trial of a person charged with homicide, it is reversible error for the court to charge the jury that if a witness has knowingly testified to that which he knew to be untrue the jury have a right to and may disregard his entire testimony, since the judge is not called on to direct the jury as to the manner in which it shall weigh the testimony or consider it.

Jessup v. Commonwealth, 12 Ky. Opin. 642.

§ 789. Reasonable doubt.

An instruction that, in order to convict the jury should be convinced from the evidence of the guilt of the accused, and that such conclusion should be so clear and strong as to exclude from their minds all measurable doubt as to the correctness of their conclusion, was held to be a correct statement of the law.

Samuel Crawford v. Commonwealth, 7 Ky. Opin. 494.

An instruction by the court on reasonable doubt, which calls the attention of the jury to the consequences resulting from acquittal upon mere light and technical doubts not growing out of the evidence, does not in itself authorize a reversal.

Parker & Hudson v. Commonwealth, 4 Ky. Opin. 597.

In the trial of a homicide case where the evidence shows that the death took place nearly three months after the shooting, and that the shot struck only the deceased's arm it is reversible error for the court to refuse to instruct the jury that before it can convict the defendant of the

killing they must believe from the evidence beyond a reasonable doubt that defendant not only shot the deceased unlawfully but that said shot was the proximate cause of the death.

Huffman v. Commonwealth, 13 Ky. Opin. 14.

An instruction in a homicide case is erroneous which says; "Unless the jury believe beyond a reasonable doubt that the accused and Frank Galloway conspired, combined or agreed together to kill the deceased and did in pursuance thereof. If so, the burden is upon the commonwealth to show which did fire the shot that killed him, and then, if they have a reasonable doubt as to which one did fire the fatal shot, they should find the defendant not guilty."

Galloway v. Commonwealth, 13 Ky. Opin. 428.

§ 795. Grade or degree of offense.

The court should not, by refusing to instruct, deprive the jury of the right to deduce from the facts proven, the conclusion that the offense committed, if any, is of a lower grade than that charged in the indictment.

Carter v. Commonwealth, 5 Ky. Opin. 777.

§ 813. Abstract instructions in general.

Where, in an instruction in the trial of a homicide case, a mere abstract proposition is stated with no evidence to support it, but it is more favorable to the accused than to the commonwealth, such instruction is not erroneous and does not injure the accused.

Davis v. Commonwealth, 11 Ky. Opin. 934.

§ 814. Application of instructions to case.

Under § 2, Act March 10, 1854, (1 R. Stat., § 414), in a prosecution for carrying a deadly weapon, the court properly refused to instruct the jury to find for the defendant upon evidence sustaining a charge, but also conducting to prove that at the time of the alleged commission of the offense defendant had prepared to go, and was about to start on a journey from Louisville, Kentucky, to Salem, Indiana, in the absence of any evidence to show that defendant on such

journey would be required to travel at night.

Henry Buchter v. Commonwealth, 6 Ky. Opin. 49.

Where an indictment charges that the accused wilfully and maliciously shot and wounded, with a deadly pistol, two persons named, with intent to kill them, the charge is that one shot had wounded both parties, and the state should be required to prove the charge as made, and an instruction that if the jury find that accused shot and wounded either of the parties they should find accused guilty, is erroneous.

Rutherford v. Commonwealth, 9 Ky. Opin. 163.

Where one is indicted for the illegal sale of liquors, and the indictment is abstracted from the clerk's office, and after one year such person is reindicted, and in the indictment it is stated it was to take the place of the missing indictment, it was proper to charge the jury that, if the offense was committed within one year prior to the finding of the first indictment, the accused was guilty.

Rogers v. Commonwealth, 9 Ky. Opin. 597.

It is never proper for the trial court to instruct as to a condition of things shown by the evidence not to exist.

Richey v. Commonwealth, 13 Ky. Opin. 177.

In the trial of a criminal case the whole law applicable to it must be given to the jury by the court, although it may not be asked; but the trial court should refuse to give any instruction not applicable to the facts disclosed by the evidence.

Williams v. Commonwealth, 13 Ky. Opin. 1069.

§ 822. Construction and effect of charge as a whole.

All the instructions given in a criminal case are to be construed together, and a defect in one may be cured by another one given.

Sugg v. Commonwealth, 12 Ky. Opin. 638.

The following instruction, when construed with others given in the

trial of one charged with murder, is held to be correct: "The court instructs the jury that a wilful killing is an intentional killing and that by the phrase 'malice aforethought' in these instructions is meant a pre-determination to do the act complained of without lawful excuse, and it is not material how suddenly or recently before the act such premeditation was formed."

Rankin v. Commonwealth, 13 Ky. Opin. 585.

In construing instructions given by the court at the trial of one charged with murder, the Court of Appeals will look to all instructions given in the case, and will refuse to reverse on account of a single instruction, which, when taken with others given, is correct and complete, and does not prejudice the substantial rights of the accused.

Rankin v. Commonwealth, 13 Ky. Opin. 585.

§ 823. Error in instructions cured by withdrawal or giving other instructions.

Instructions given in a trial must be construed together, and where one standing alone might be erroneous it may be cured by a second instruction.

Letcher v. Commonwealth, 13 Ky. Opin. 1.

(H) REQUESTS FOR INSTRUCTIONS.

§ 825. Further or more specific instructions.

It is within the power of a trial court in a criminal case to give to the jury additional instructions after the argument is begun, and it is necessary in a proper case to exercise this power to avoid injustice to the accused, as well as to the commonwealth.

Parks v. Commonwealth, 10 Ky. Opin. 292.

§ 829. Instructions already given.

It is not error for the court to refuse to give an instruction, though a proper one, when the court gives the substance thereof in an instruction of its own.

Farrell v. Commonwealth, 13 Ky. Opin. 988.

(J) CUSTODY, CONDUCT, AND DE-LIBERATIONS OF JURY.**§ 854. Separation.**

It is not a sufficient ground for a new trial to show that the jury were allowed to separate during the trial of a murder case, where nothing is shown to have occurred prejudicial to the rights of the accused.

Fowler v. Commonwealth, 13 Ky. Opin. 853.

(K) VERDICT.**§ 870. Special verdict or findings.**

After verdict and judgment of conviction in a criminal case, the indictment should be construed literally to sustain the finding of the jury.

Martin v. Commonwealth, 8 Ky. Opin. 496.

There is no provision of the statute for special findings in misdemeanor cases when a jury is waived; but since such findings are equivalent to the special verdict provided by Crim. Code, 1876, §§ 257 and 260, the court will so regard them.

Pendenn's Club v. City of Louisville, 13 Ky. Opin. 1102.

§ 871. Preparation and formulation.

While, in the trial of a criminal cause, the verdict is required to be declared by the foreman of the jury, a verdict saying "We the jury find the defendant guilty as charged in the within indictment and fix his punishment at one year in the state penitentiary," and it is signed J. H. Yazer, one of the jury, and the judge adds a word or two to it and then has it returned over again, the accused is not prejudiced by the alteration, nor by the fact that the signer of the verdict signs himself as one of the jury instead of foreman.

Walker v. Commonwealth, 13 Ky. Opin. 508.

§ 872. Rendition and reception.

Where one is tried for a felony and attends the trial but runs away from the courtroom when the jury retire, and is absent when the jury returns the verdict, and is not arrested for four years thereafter, he is not entitled to a reversal of the judgment on

appeal on account of his absence when the verdict was rendered.

Smith v. Commonwealth, 12 Ky. Opin. 682.

§ 876½. Trial of indictments together.

It is not necessary to the conviction of one jointly indicted with another that both should be proven guilty, but where a separate offense by each is proven, unless the state will dismiss as to one, both must be convicted.

Commonwealth v. Rogers, 10 Ky. Opin. 435.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.**§ 905. Nature and scope of remedy of new trial in general.**

On an issue and trial of a fact by a jury a motion for a new trial is essential to correct the errors growing out of the evidence or instructions before an appeal can be entertained.

Commonwealth v. Cookendorfer, 4 Ky. Opin. 616.

§ 922. Instructions and failure or refusal to instruct.

Where in a murder trial, some instructions are given and others are refused, and the defendant by his grounds for a new trial assigns the giving and refusing of certain named instructions, and the instructions given are correct and those refused were properly refused, a new trial can not be granted on the ground that instructions should have been given upon other points.

Johnson v. Commonwealth, 10 Ky. Opin. 945.

§ 924. Misconduct of or affecting jurors.**§ 925.—In general.**

There is no error in refusing to grant a new trial on account of the alleged misconduct of a juror upon the mere ex parte affidavit of a single witness; but a verdict should not be set aside on such grounds without the clearest and most satisfactory evidence.

Smith v. Commonwealth, 9 Ky. Opin. 363.

§ 937. Newly discovered evidence.**§ 938.—In general.**

Newly discovered evidence is not a sufficient ground for a new trial, when such evidence would throw but little, if any light upon the case favorable to the defendant.

Stovall v. Commonwealth, 11 Ky. Opin. 820.

§ 939.—Diligence.

A new trial will not be granted on account of newly discovered evidence where no diligence is shown in discovering the evidence.

Reed v. Commonwealth, 13 Ky. Opin. 849.

§ 943.—Conflicting or contradicted evidence.

A motion for a new trial on account of newly discovered evidence will not be granted when it would only serve to contradict two or three witnesses who testified as to at least a portion of the circumstances of the killing by showing that they were not immediately present, and the transaction was otherwise fully proved by uncontradicted testimony.

Drake v. Commonwealth, 13 Ky. Opin. 848.

§ 967. Grounds for arrest of judgment.**§ 968.—In general.**

The only grounds on which a judgment can be arrested is that the facts shown in the indictment do not constitute a public offense within the jurisdiction of the court.

Berry v. Commonwealth, 4 Ky. Opin. 639.

A judgment of conviction in a criminal case can be arrested only because the indictment does not charge facts constituting a public offense within the jurisdiction of the court.

Buckner v. Commonwealth, 4 Ky. Opin. 646.

The only ground upon which a motion in arrest of judgment can be sustained is that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court.

Graves v. Commonwealth, 9 Ky. Opin. 204.

The only ground upon which a judgment in a criminal case may be arrested is that the facts pleaded in the indictment do not constitute a public offense within the jurisdiction of the court.

Davis v. Commonwealth, 11 Ky. Opin. 969.

§ 970.—Defects in indictment or information.

Where in an indictment a defendant is charged with stealing a horse in 1874 from a certain named person, it was competent for the commonwealth to prove that the theft took place in 1872.

Realy v. Commonwealth, 8 Ky. Opin. 759.

The only ground upon which a judgment can be arrested is that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court.

Creech v. Commonwealth, 12 Ky. Opin. 599.

§ 974. Motions in arrest of judgment.

When an indictment states facts constituting a public offense within the jurisdiction of the court, however defective or irregular the indictment may be, a motion in arrest of judgment should be overruled.

Sapp v. Commonwealth, 9 Ky. Opin. 2.

A motion for an arrest of judgment in a criminal case will not be sustained when a public offense is charged in the indictment.

Cox v. Commonwealth, 8 Ky. Opin. 479.

A motion to arrest judgment will only be sustained when the indictment fails to contain a statement of facts constituting a public offense within the jurisdiction of the court.

Bradley v. Commonwealth, 8 Ky. Opin. 599.

XV. APPEAL AND CERTIORARI.**(A) FORM OF REMEDY, JURISDICTION AND RIGHT OF REVIEW.****§ 1021. Decisions reviewable.****§ 1023.—Appealable judgments and orders.**

No appeal can be taken from the

action of the trial court in arbitrarily striking a criminal cause from the docket, where no final judgment of any kind was entered in such court.

Commonwealth v. Brown, 9 Ky. Opin. 239.

Where there is no conviction in a criminal case, but it is shown that during the trial by reason of the sickness of a witness the court at the instance of the commonwealth discharged the jury against the objection of the defendant and continued the cause, the Court of Appeals can not entertain an appeal, for an appeal can only be taken from a final judgment.

Smith v. Commonwealth, 12 Ky. Opin. 595.

§ 1025. Right of defendant to review.

§ 1026.—In general.

The granting of an appeal in felony cases from a final judgment of conviction is a matter of right, and not a mere matter of grace with the court.

Cain v. Commonwealth, 10 Ky. Opin. 215.

(B) PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

§ 1029. Necessity of objections.

Where an illegal order suspending a license to sell spiritous liquors is submitted as evidence in the court below, objection to its illegality must be made at the time of its introduction, since it can not be availed of for the first time on appeal.

Shepherd v. Commonwealth, 1 Ky. Opin. 372.

If no objection or exception is made to statements made by the commonwealth's attorney in argument at the time they are made, no relief can be had on account of such statements when objection is made for the first time in this court.

Sexton v. Commonwealth, 13 Ky. Opin. 148.

§ 1038.—Instructions.

In a criminal case where no exceptions are made to instructions given at the instance of the commonwealth,

objections are waived and will not be considered by the court of appeals.

Waddle v. Commonwealth, 8 Ky. Opin. 577.

§ 1044. Necessity of motion presenting objection.

A defendant charged with a felony can not be heard to complain in the Court of Appeals of correctible errors made in the lower court, when he neither made objection to them nor excepted to the action of the trial court at the time.

Galloway v. Commonwealth, 11 Ky. Opin. 951.

§ 1047. Necessity of exceptions.

Errors by the trial court are not available in the appellate court, unless excepted to as allowed by section 276, Crim. Code.

Rudy v. Commonwealth, 2 Ky. Opin. 200.

§ 1048.—In general.

Where instructions in a criminal trial are given verbally and are not in the record, it can not be determined whether the accused was prejudiced by them or not, and where a written instruction was not excepted to, though erroneous, the error will ordinarily not avail the accused in the Court of Appeals.

Strassel v. Commonwealth, 11 Ky. Opin. 886.

Exceptions must be taken upon the ruling of the trial court, where a party complaining wants a reversal, and the exceptions must be shown by a bill of exceptions.

Pulliam v. Commonwealth, 13 Ky. Opin. 9.

§ 1063. Necessity of motion for new trial or in arrest.

The Court of Appeals has no jurisdiction to consider any error not first made to appear in a motion for a new trial.

Peters v. Commonwealth, 13 Ky. Opin. 204.

(C) PROCEEDINGS FOR TRANSFER OF CAUSE, AND EFFECT THEREOF.

§ 1069. Time of taking proceedings.

Under the provisions of Crim. Code

(1876), § 369, no appeal can be taken from a judgment of a county judge or of a city, police or justice's court after 60 days from the rendition thereof.

Bright v. Commonwealth, 11 Ky. Opin. 647.

(D) RECORD AND PROCEEDINGS NOT IN RECORD.

§ 1089. Bill of exceptions.

An instruction not embraced in the bill of exceptions will not be considered by the Court of Appeals.

Sullivan v. Commonwealth, 5 Ky. Opin. 120.

§ 1090. Necessity.

The object of a bill of exceptions, which the trial court inspects and settles by signing, is to show just what occurs upon a trial, and the recitations in it must control and be taken as true and correct.

McNeely v. Commonwealth, 13 Ky. Opin. 553.

§ 1092.—Settlement, signing and filing.

In a prosecution for a misdemeanor, an appeal can not be maintained unless the record is lodged in the office of the clerk of the Court of Appeals within sixty days after the judgment is rendered.

McElrouge v. Commonwealth, 1 Ky. Opin. 445.

§ 1106. Transmission and filing.

Where an appeal is taken in a criminal case the record must be lodged with the clerk of the Court of Appeals within sixty days after the judgment is rendered, and where not filed within that time it will be dismissed on motion.

Louisville & N. R. Co. v. Commonwealth, 8 Ky. Opin. 309.

(F) DISMISSAL, HEARING, AND RE-HEARING.

§ 1131. Dismissal.

Where one is arrested for the offense of keeping a disorderly house and tried before the city court, and fined \$60, and on appeal the cause is dismissed, it is proper, when it

is shown that the city court had no jurisdiction of the offense named in the warrant, because the offense named was not a violation of any city ordinance of the city.

Commonwealth v. Douglas, 11 Ky. Opin. 523.

(G) REVIEW.

§ 1134. Scope and extent in general.

When, in a criminal case, there is any evidence tending to establish guilt, the Court of Appeals will not reverse and set aside a verdict of guilty returned by a jury, the weight to be given to evidence being exclusively for the jury.

Spencer v. Commonwealth, 12 Ky. Opin. 710.

In a criminal prosecution, if there is any testimony to sustain the verdict and judgment, the Court of Appeals has no power to reverse the cause, but if there is an entire absence of proof, the question of guilt becomes one of law as well as of fact.

Porter v. Commonwealth, 13 Ky. Opin. 759.

§ 1140. Presumptions.

§ 1144.—Facts or proceedings not shown by record.

Where a bill of exceptions fails to set out the rulings of the court as to the law, the presumption is that the rulings were correct.

City of Louisville v. Templeton, 6 Ky. Opin. 630.

Where the record on appeal in a criminal cause fails to disclose the circumstances under which the statement in the nature of a confession of the prisoner was made, the Court of Appeals will presume that they were such as made the evidence competent.

Johnson v. Commonwealth, 10 Ky. Opin. 945.

Where the evidence is not brought up to the Court of Appeals in a criminal cause, the presumption is that such evidence sustains the verdict; and this court will not reverse on account of an instruction which seems to have been given in view of conflicting evidence, for such evidence

may have been of such a character as to render harmless the instructions on that point, and in the absence of the evidence this court can not determine that even an erroneous instruction was harmful or prejudiced the substantial rights of the appellant.

Ford v. Commonwealth, 12 Ky. Opin. 526.

§ 1146. Discretion of lower court.

The appellate court, under § 334, Crim. Code, has no power to reverse a judgment of conviction in a prosecution for felony, because of error by the court below in refusing a continuance.

Parker & Hudson v. Commonwealth, 4 Ky. Opin. 597.

§ 1151.—Continuance.

The Court of Appeals can not reverse a homicide case on account of the fact that the trial court refused a continuance where only that part of the record is before it showing the affidavit for the continuance and its denial, for the whole record may show that the witness for whose attendance the continuance was asked would testify only to facts cumulative in character or not material to the issue.

Turner v. Commonwealth, 11 Ky. Opin. 640.

§ 1153.—Reception of evidence.

Where two or more persons are accused of crime, and there is a separate trial as to one, and there is no allegation or sufficient proof of conspiracy to commit the crime, it is error in such trial to admit evidence that another who is charged with the crime had fled the country, since the one on trial is not chargeable with the fact that the other has fled.

Mullins v. Commonwealth, 11 Ky. Opin. 527.

§ 1157. Questions of fact, verdicts and findings.

A judgment of a court in a criminal law action stands on the same footing as the verdict of a jury, and will not be disturbed unless palpably against the weight of the evidence.

Hawkins v. Lee, 6 Ky. Opin. 156.

Where the evidence shows that accused was guilty of an unwarranted attack upon the deceased, who was

acting in a role of defense, a verdict will not be disturbed.

Morrison v. Commonwealth, 3 Ky. Opin. 134.

§ 1161. Harmless error.

§ 1162.—Prejudice to rights of party as ground of review.

If one is accused in one count of indictment with rape of a child less than twelve years old and in another count with carnally knowing her, even granting that a motion requiring the commonwealth to elect upon which count it would proceed should have been granted, the error is harmless where the accused is convicted only of the lesser offense.

Reed v. Commonwealth, 13 Ky. Opin. 849.

§ 1165.—Prejudice to defendant in general.

When fundamental rights are involved in a criminal case, such as the right of trial by jury, the right to be heard by counsel and the right to be present during the trial, the Court of Appeals will reverse unless it affirmatively appears from the record that the defendant has not been injured; but in cases where such rights are not involved the court will not reverse unless it affirmatively appears from the record that the error complained of is detrimental to the substantial rights of the accused.

Austin v. Commonwealth, 11 Ky. Opin. 664.

§ 1168.—Rulings as to evidence in general.

In a felony case Criminal Code (1876), § 219, requires the indictment to be read to the jury by the clerk or commonwealth's attorney and a statement of the defendant's plea thereto, next in order after the jury is sworn, but where such indictment is not read, and the plea stated at that time, but the reading and statement take place before the close of the evidence for the state, in the absence of a motion of the defendant to recall the witnesses and reintroduce the evidence, there will be no reversal, as the substantial rights of the accused are not prejudiced by the omission to read the indictment at the proper time.

Galloway v. Commonwealth, 11 Ky. Opin. 951.

§ 1169.—Admission of evidence.

While incompetent evidence can not always be entirely removed from the minds of a jury by an instruction attempting to withdraw it, still this court can not reverse a cause for any error unless it affirmatively appears that the error prejudiced the substantial rights of the accused.

Rowlett v. Commonwealth, 11 Ky. Opin. 571.

§ 1172.—Instructions.

Under section 349, Crim. Code, providing that an error in granting or refusing a new trial shall not be cause for reversal, the sufficiency of the evidence to sustain a charge in an indictment can not be inquired into by the appellate court nor the judgment reversed on that ground.

Glackman v. Commonwealth, 2 Ky. Opin. 251.

Instructions relating to murder, if erroneous, can not have prejudiced the defendant, where he was not convicted of murder.

Beazley v. Commonwealth, 7 Ky. Opin. 201.

One who was prosecuted for homicide can not complain of an instruction on the question of malice, where he was convicted only of manslaughter.

Bowman v. Commonwealth, 7 Ky. Opin. 656.

There can be no reversal for an error in instructing or in refusing to instruct the jury, unless all of the instructions given by the court are contained in the bill of exceptions.

Highly v. Commonwealth, 8 Ky. Opin. 579.

An instruction in a criminal case is erroneous, which fails to say to the jury that before it can convict it must believe in the existence of recited facts beyond a reasonable doubt; and, saying to the jury, it must acquit if it has a reasonable doubt as to the guilt of the accused, does not dispense with the necessity of charging that it must believe from the evidence beyond a reasonable doubt that such

facts existed before it could find the accused guilty.

Rouse v. Commonwealth, 8 Ky. Opin. 606.

Mere omissions to give the whole law in instructions in the record might be presumed to have been cured by missing instructions; but when those in the record are necessarily inconsistent with the law of the case the cause will be reversed because the instructions were inconsistent with each other.

Sapp v. Commonwealth, 9 Ky. Opin. 2.

Where instructions given by the court in a criminal case were not objected or excepted to, they can not be considered by this court.

Gale v. Commonwealth, 10 Ky. Opin. 301.

Even where an instruction is erroneous this court will not reverse where it is shown to be prejudicial to the substantial rights of the accused.

Crittenden v. Commonwealth, 11 Ky. Opin. 193.

Where under a statute the punishment prescribed is imprisonment in the penitentiary from two to ten years, and the court instructs the jury that if they find the accused guilty they should fix the punishment for not less than one nor more than five years, and defendant's punishment is for a period more than one and less than five years, the error in the instruction did not prejudice the rights of the defendant and he can not complain.

Creech v. Commonwealth, 12 Ky. Opin. 599.

(H) DETERMINATION AND DISPOSITION OF CAUSE.**§ 1185. Reversal.****§ 1186.—In general.**

The Court of Appeals can only reverse a judgment in a misdemeanor case for errors of law appearing in the record and prejudicial to defendant.

Marshall v. Commonwealth, 6 Ky. Opin. 742.

Where a judgment has been rendered in a misdemeanor case reversal can not be had merely because a demurrer has been improperly overruled, or for error in granting or refusing a new trial. Code of Practice, § 349, p. 659.

Caldwell v. Commonwealth, 6 Ky. Opin. 116.

The Court of Appeals has no power to reverse a judgment upon a conviction for a felony on the ground that it is contrary to the evidence.

Flannigan v. Commonwealth, 6 Ky. Opin. 288.

The Court of Appeals has no power to reverse a judgment of acquittal in a prosecution for a misdemeanor, except for errors of law which occurred on the trial and appear of record.

City of Louisville v. Templeton, 6 Ky. Opin. 630.

Under § 349, Criminal Code, the Court of Appeals has no power to reverse a judgment for a misdemeanor because of error in overruling a demurrer to the indictment.

Waddell v. Commonwealth, 7 Ky. Opin. 713.

On appeal from a conviction for manslaughter, the case will not be reversed for error in instructions as to murder, when it could not have prejudiced the accused.

Mullins v. Commonwealth, 7 Ky. Opin. 26.

Where there is no authenticated statement of the testimony in the record, the Court of Appeals can not reverse on account of instructions, unless they are such as would be erroneous under any state of proof.

Bowman v. Commonwealth, 7 Ky. Opin. 656.

If the right of self-defense in a prosecution for homicide was not presented by instruction, the Court of Appeals will not reverse the case where it does not appear that the substantial rights of the accused had been prejudiced.

Moore v. Commonwealth, 7 Ky. Opin. 218.

The Court of Appeals can not reverse a case for abuse of discretion of the trial court in arranging the order of argument of counsel for the state.

Bowman v. Commonwealth, 7 Ky. Opin. 656.

The Court of Appeals has no power to reverse a judgment of conviction on indictment for an error in overruling a demurrer.

Blacketer v. Commonwealth, 8 Ky. Opin. 541.

The Court of Appeals has no power to reverse a criminal cause on account of the trial court's error in overruling a demurrer to an indictment.

Waddle v. Commonwealth, 8 Ky. Opin. 577.

This court will not reverse a criminal case for an erroneous instruction which, when taken in connection with other instructions, did not prejudice the substantial rights of the defendant.

Jannings v. Commonwealth, 10 Ky. Opin. 306.

Where an erroneous instruction is given, which was not prejudicial to the substantial rights of the accused, the cause will not be reversed on account of it.

Brown v. Commonwealth, 10 Ky. Opin. 375.

The Court of Appeals has no power to reverse a judgment for an error in instructing the jury in the absence of any of the instructions given, unless those contained in the record could not under any circumstances and with any modification or explanation be the law applicable to the case; and where the record does not contain all the instructions given, this court will presume that those given, but not in the record, supplied and explained those given and contained in the record.

Davis v. Commonwealth, 11 Ky. Opin. 969.

The Court of Appeals will not reverse a criminal cause on the weight of evidence.

Gent v. Commonwealth, 12 Ky. Opin. 549.

This court can reverse a criminal cause only for an error of law committed to the defendant's prejudice, since questions of fact are for the jury.

Gent v. Commonwealth, 12 Ky. Opin. 549.

In a criminal case the jury and the trial judge determine the facts from the evidence, and the Court of Appeals can not reverse because it may think the evidence fails to establish guilt beyond a reasonable doubt.

Pulliam v. Commonwealth, 13 Ky. Opin. 9.

Where evidence is properly admitted in the trial of a criminal cause, the jury is to determine what weight is to be given to it, and the Court of Appeals will not reverse a decision on account of the weight of evidence.

Neal v. Commonwealth, 13 Ky. Opin. 70.

In the trial of a criminal case, the jury must weigh and determine the evidence, and the Court of Appeals will never reverse because of insufficient evidence, but may do so where there was no competent evidence tending to establish guilt.

Peters v. Commonwealth, 13 Ky. Opin. 204.

XVII. PUNISHMENT AND PREVENTION OF CRIME.

§ 1208. Extent of punishment in general.

In a felony case, where there is any evidence to go to the jury, tending to establish guilt, this court can not consider whether the penalty is too light or too severe, such questions are for the jury exclusively.

Duke v. Commonwealth, 13 Ky. Opin. 278.

CROPS.

Contract for cultivation of crop, see Landlord and Tenant, § 326.

Damages to crop in failure to erect fence, see Railroads, § 103.

Levy of execution on, see Execution, § 24.

CROSS-APPEAL.

When permissible, see Appeal, § 14.

CROSS-PETITION.

See Pleading, III., E.

Judgment on, see Judgment, §§ 246, 247.

When service of process on cross-defendant not necessary, see Process, § 56.

CROSS-EXAMINATION.

See Equity, § 353; Witnesses, III., B.

CRUELTY.

Ground for divorce, see Divorce, § 27.

CURTESY.

§ 1. Nature and existence of estate.

§ 8. Property subject to curtesy.

§ 9. Estates subject to curtesy.

§ 11. Bar, release, or forfeiture.

§ 12. Rights and remedies of tenant by curtesy.

§ 1. Nature and existence of estate.

A tenant by the curtesy has the right to hold the land until his death, and the manner of his holding can not affect the rights of his children by his first wife, who take the land at his death.

Shepherd v. Sharp, 10 Ky. Opin. 885.

§ 8. Property subject to curtesy.

A husband living with his children, after the death of his wife, who was the owner of the homestead, becomes a tenant by the curtesy which entitles him to a homestead in it against any creditor, since being a life tenant living upon the land with his children, he is entitled to a homestead exemption.

English v. Studiker & Co., 11 Ky. Opin. 947.

§ 9. Estates subject to curtesy.

Where plaintiff's claim to curtesy depends for its validity upon the invalidity of a decree for divorce ren-

dered in another state, it will be presumed, in the absence of evidence to the contrary, that the court rendering the decree of divorce had jurisdiction and that the decree is valid.

Mounts v. R. Denville's Heirs, 7 Ky. Opin. 471.

Where a husband and wife separate and a separate estate is created in the wife by a conveyance made to a trustee, the husband may still have curtesy unless there is some declaration in the instrument releasing such right; and where the intention to prevent curtesy is not clear, courts of equity favor the husband's right.

Green v. Meyers, 9 Ky. Opin. 354.

§ 11. Bar, release, or forfeiture.

A divorce bars all claims to curtesy, and while a husband during marriage has a right to rent his wife's lands for not more than three years at a time, and the right of common occupancy, the dissolution of the marriage destroys his power to either rent or occupy it.

Adams v. Adams, 12 Ky. Opin. 76.

§ 12. Rights and remedies of tenant by curtesy.

Where the evidence shows that husband and wife, after their marriage, did not live in the county in which the land of the wife was situated, during the life of the wife; as the husband never had possession of the land during the life of the wife, he could not claim curtesy, and a subsequent entry and possession by him will inure only to the benefit of the heir of the deceased wife.

Saterly v. Thompson, 1 Ky. Opin. 626.

CUSTOMS AND USAGES.

§ 2. Requisites and validity.

§ 5.—Generality.

§ 9. Application and operation.

§ 17.—Varying terms of contract.

Of brokerage business, see *Brokers*, § 8.

§ 2. Requisites and validity.

§ 5.—Generality.

Before a custom can become a law,

it must appear that the usage has been general and uniform, and the custom peaceably acquiesced in, and not subject to contention and dispute.

Fowler Mills & Co. v. Smedley, 2 Ky. Opin. 389.

Special customs often create confusion of legal rules in directions not contemplated in their adoption, and they are to be admitted into the laws with great reluctance; and it can not often be a hardship to parties to reject a custom, so long as they are left free to make their own bargains, and can, if they are disposed to do so, incorporate the custom into their contract, as a part thereof.

Fowler Mills & Co. v. Smedley, 2 Ky. Opin. 389.

To make a custom and usage a *bona fide* one, it is a prerequisite that the custom be certain and that it be a reasonable one; and where parties charter a steamboat, they may purchase articles to transport on it more valuable than the boat itself, and if it should be liable for the price, the property of the owner may be incumbered and put to hazard, by the reckless conduct of an insolvent bailee.

Fowler Mills & Co. v. Smedley, 2 Ky. Opin. 389.

Uniformity being the first requisite in the establishment of law by custom, a petition that alleges in substance that, in the case of furnishing a steamboat with goods and supplies for speculation by parties thereto, or to produce freight for the boat, in all such cases steamboat men, merchants and others at and up the T. river, regard the boat liable for such debts, and that it has been so long acquiesced in that it has become a well established usage, and that it is a valid custom, is held not sufficient to establish that the custom was uniform and general.

Fowler Mills & Co. v. Smedley, 2 Ky. Opin. 389.

§ 9. Application and operation.

A statute giving a lien on steamboats for certain debts, operates to destroy any local custom by which

liens are asserted for debts and liabilities not enumerated in the statute.

Fowler Mills & Co. v. Smedley,
2 Ky. Opin. 389.

§ 17.—Varying terms of contract.

The custom of horsemen can not control a written contract relating to a stallion, or change its legal effect, especially when one of the parties notified the other that the custom formed no part of the contract.

Buford v. Cameron, 6 Ky. Opin. 734.

DAM.

See Nuisance, § 81.

Rights of owner of, see Navigable Waters, § 22.

DAMAGES.

II. NOMINAL DAMAGES.

§ 10. Nominal or substantial damages.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) DIRECT OR REMOTE, CONTINGENT, OR PROSPECTIVE CONSEQUENCES OR LOSSES.

§ 17. Proximate or remote consequences.

§ 18.—In general.

§ 24. Contingent and possible consequences.

§ 25. Prospective and anticipated consequences.

§ 26.—In general.

§ 35. Pecuniary losses.

§ 39.—Loss of or injury to property.

§ 47. Mental suffering.

§ 52.—Fright or apprehension of personal injury.

IV. LIQUIDATED DAMAGES AND PENALTIES.

§ 75. Construction of stipulations.

§ 76.—In general.

V. EXEMPLARY DAMAGES.

§ 87. Nature and theory of damages additional to compensation.

§ 91. Grounds for exemplary damages.

VI. MEASURE OF DAMAGES.

(A) INJURIES TO THE PERSON.

§ 95. Mode of estimating damages in general.

§ 97. Physical suffering and inconvenience in general.

(B) INJURIES TO PROPERTY.

§ 103. Mode of estimating damages in general.

§ 107. Injuries to real property.

§ 111.—Buildings and other improvements.

§ 113. Injuries to personal property.

(C) BREACH OF CONTRACT.

§ 120. Failure to perform in general.

§ 123. Defects in performance.

§ 126. Failure to deliver property.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

§ 128. Grounds of objection to amount.

§ 129. Injuries to the person.

§ 130.—In general.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(A) PLEADING.

§ 141. Allegations as to damage in general.

§ 142. General or special damage.

(B) EVIDENCE.

§ 164. Admissibility.

(C) PROCEEDINGS FOR ASSESSMENT.

§ 193. Inquest on default or interlocutory judgment.

§ 198.—Assessment by jury.

§ 209. Instructions.

See Libel and Slander, IV., D; Replevin, V.; Trespass, §§ 47, 58.

Action for conversion, see Trover and Conversion, §§ 41, 43, 44, 48.

Assessment of damages by jury, see Trial, § 136.

Assessment of damages in condemnation proceedings, see Eminent Domain, §§ 122, 139, 213, 225.

Breach of contract for cultivation of land, see Landlord and Tenant, § 331.

Breach of contract of purchase, see Sales, § 370; Vendor and Purchaser, VII., B.

Breach of contract of sale, see Sales, § 418.

Complaint for unlawful seizure of property, see Pleading, § 71.

Excessive damages as ground for new trial, see New Trial, § 76.

Exemplary damages for assault and battery, see Assault and Battery, § 39.

For breach of contract made with county court, see Counties, § 128.
 For breach of contract to collect taxes, see Sheriffs and Constables, § 16.
 For breach of covenant, see Covenants, § 99.
 For injuries to passengers, see Carriers, § 319.
 For wrongful attachment, see Attachment, § 355, 375.
 For wrongful execution, see Execution, § 472.
 For unlawful sales of intoxicating liquor, see Intoxicating Liquors, IX.
 In action for forcible ejection, see Forcible Entry and Detainer, § 30.
 In action of ejectment, see Ejectment, § 132.
 Measure of damages, see Trover and Conversion, § 44.
 Measure of damages for assault, see Assault and Battery, § 37.
 Measure of damages for breach of covenants, see Covenants, § 123.
 Measure of damages for breach of mining lease, see Mines and Minerals, § 61.
 Measure of damages for failure to pay notes at maturity, see Bills and Notes, § 528.
 Measure of damages for failure to pay subscriptions to stock, see Corporations, § 88.
 Measure of damages in sale of whisky, see Sales, § 442.
 Obstructing right of easements, see Easements, § 70.
 On dissolution of injunction, see Injunction, §§ 185, 252.
 Punitive damages, see Libel and Slander, § 120; Trespass, § 56.
 Punitive damages not recoverable in action on attachment bond, see Attachment, § 351.
 Recoupment of damages for breach of warranty, see Bills and Notes, § 528.
 Resulting from public improvements, see Municipal Corporations, IX., D.
 Resulting from injunction, see Injunction, § 252, 261.
 Resulting from wrongful attachment, see Attachment, § 365.
 Special damages from obstruction of highway, see Highways, § 155.

II. NOMINAL DAMAGES.

§ 10. Nominal or substantial damages.

In ascertaining the damages to which the owner of a dwelling is entitled by the refusal of a contractor to complete the work on same, the criterion is to ascertain what it would cost to finish the house above the contract price, and if larger, the contractor would be responsible, but if no more, or less, the owner would be entitled to only nominal damages. *Brown v. Murphy*, 4 Ky. Opin. 365.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) DIRECT OR REMOTE, CONTINGENT, OR PROSPECTIVE CONSEQUENCES OR LOSSES.

§ 17. Proximate or remote consequences.

§ 18.—In general.

To make a defendant liable for damages caused by his negligence, the negligence complained of must be the proximate cause of the injury, and an instruction not recognizing this rule is erroneous.

Current v. Cantrill, 8 Ky. Opin. 546.

§ 24. Contingent and possible consequences.

Remote and uncertain damages can not be recovered under a counterclaim filed in a suit for the purchase money of machinery.

Monarch v. Young, 8 Ky. Opin. 232.

§ 25. Prospective and anticipated consequences.

§ 26.—In general.

In a damage suit, plaintiff is entitled only to recover for damages sustained prior to the commencement of his action.

Cooper v. Thomas, 8 Ky. Opin. 368.

§ 35. Pecuniary losses.

§ 39.—Loss of or injury to property.

Where in a suit for damages against one for negligently operating a threshing machine so that fire escaped

from the machinery and destroyed plaintiff's grain, and the quantity of the grain destroyed is not proven by measurement or the actual knowledge of witnesses, but by their opinions of the quantity of grain the destroyed ricks would yield, the jury have the right to test the accuracy of the testimony by their own intelligence on such matters, and having arrived at a verdict it will not be set aside because claimed to be for too small amount of damages.

Sayers v. Stoner & Roby, 10 Ky. Opin. 358.

§ 47. Mental suffering.

§ 52.—Fright or apprehension of personal injury.

Where masked persons, having threatened injury to another, approach his residence in the night time, making a loud noise, such as was calculated to alarm such person and his family and keep them awake, and to produce in their minds a reasonable apprehension that something more than frightening of the family was intended, such person may recover damages for such trespass, and this is true whether the mob remains in the highway or enters upon the premises.

Watts v. Rogers, 10 Ky. Opin. 303.

IV. LIQUIDATED DAMAGES AND PENALTIES.

§ 75. Construction of stipulations.

§ 76.—In general.

While parties to a contract may agree to liquidated damages and courts will enforce the payments upon breach shown, still when the sum agreed to amounts to penalty or forfeiture, or exceeds in a material degree the injury sustained, it will not be enforced, since courts will not countenance liquidated damages which are used as a mere guise to a forfeiture as penalty.

Delaney v. Trustees Cincinnati Southern R. Co., 12 Ky. Opin. 570.

V. EXEMPLARY DAMAGES.

§ 87. Nature and theory of damages additional to compensation.

Vindictive or exemplary damages

are such as are given against a defendant who, in addition to the trespass, has been guilty of acts of outrage and wrong which can not well be rewarded by compensation in money.

Maysville & Lexington Tpk. Co. v. Kniffen, 4 Ky. Opin. 92.

Exemplary damages can only properly be given in cases of trespass or tort, accompanied by oppression, fraud, malice, or negligence so gross as to raise a presumption of malice.

Maysville & Lexington Tpk. Co. v. Kniffen, 4 Ky. Opin. 92.

In cases where the negligence is in leaving a horse and wagon without an attendant, or any way secured or guarded, exemplary or vindictive damages are not to be given unless the negligence complained of is so gross as to raise the presumption of malice.

Reichman v. Stokle, 3 Ky. Opin. 295.

Where plaintiff willingly engaged in a combat, he can not recover exemplary damages in an action therefor.

Evans v. Littell, 5 Ky. Opin. 650.

Unless plaintiff seeks to recover punitive damages, it is not necessary to prove that the injury complained of was inflicted either purposely or wantonly.

Walsh v. Powers, 8 Ky. Opin. 576.

§ 91. Grounds for exemplary damages.

Where the evidence does not show a wilful wrong or wanton recklessness on the part of those in charge of the train which injured plaintiff, it was error to give an instruction authorizing a finding of punitive damages.

Kentucky Cent. R. Co. v. Dills, 7 Ky. Opin. 501.

A party may recover exemplary damages without averring malice, in an action for an unlawful injury to the person.

Finnell v. VanArsdall, 8 Ky. Opin. 416.

VI. MEASURE OF DAMAGES.

(A) INJURIES TO THE PERSON.

§ 95. Mode of estimating damages in general.

The instructions should be for com-

pensation and remuneration for loss of time, necessary expenditures and permanent disability.

Reichman v. Stolke, 3 Ky. Opin. 295.

In an action for personal injuries, it was held improper in instructing the jury to call their special attention to future deprivation or loss of health, since future pain and deprivation of health are necessarily included in the permanent reduction in plaintiff's earning power, and to thus single them out, gives undue importance to them.

Green v. Trustees of Richmond, 7 Ky. Opin. 434.

In an action for compensatory damages for personal injuries, the size of the plaintiff's family or his poverty is not competent to go to the jury.

Green v. Trustees of Richmond, 7 Ky. Opin. 434.

In an action for personal injuries the jury should be instructed to base their verdict upon the expense of cure, the value of time lost, fair compensation for physical and mental suffering, and for permanent reduction of the plaintiff's earning power.

Citizens Passenger R. Co. v. Pank, 7 Ky. Opin. 663.

An instruction that "If the jury find for the plaintiff, they may find not only an amount sufficient to compensate her for the actual injuries sustained by her, but may take into consideration the expense incurred by plaintiff by reason of the injuries, the loss of time to her occasioned by the injuries, her suffering, both mental and physical, and the character, extent and duration of the injuries, and find such amount as in their opinion all the facts and circumstances connected in the case justify, not exceeding the amount claimed in the petition," was held erroneous as authorizing double damages.

Citizens Passenger R. Co. v. Pank, 7 Ky. Opin. 663.

In an action for personal injuries, compensatory damages consist of the cost of cure, loss of time, fair compensation for mental and physical suf-

fering, and for any permanent reduction of the plaintiff's earning power.

Green v. Trustees of Richmond, 7 Ky. Opin. 434.

In actions for personal injuries, the jury should have been instructed as to what elements or circumstances go to make up the compensation to be allowed the injured party.

Town of Bowling Green v. White, 7 Ky. Opin. 448.

§ 97. Physical suffering and inconvenience in general.

In an action for personal injury, it was held improper to instruct the jury that they should consider future pain in fixing the amount of damages, where the evidence shows that plaintiff had then recovered from the injury.

Green v. Trustees of Richmond, 7 Ky. Opin. 434.

(B) INJURIES TO PROPERTY.

§ 103. Mode of estimating damages in general.

Where there is no value fixed upon property by witness, it is error to leave the assessing of such value to the jury, or to instruct as to a criterion by which a value could be arrived at.

Eubank v. Wheat, Baker & Co., 1 Ky. Opin. 11.

When the use of money is enjoined, the rate of damages does not exceed ten per cent.

Wyatt v. Tinsley, 8 Ky. Opin. 59.

§ 107. Injuries to real property.

In order to entitle one to recover for permanent injury to land, it is not necessary that he should hold the legal title, but he has a right of action if he was the owner of the property and in possession of it.

Nashville & Chattanooga R. Co. v. Murphy, 6 Ky. Opin. 118.

§ 111.—Buildings and other improvements.

In an action for damages for injury to a building, the plaintiff is entitled not only to recover the cost of repairing the injury, but also for any diminution in the value of the use

of the property resulting from such injury.

Cooper v. Thomas, 8 Ky. Opin. 368.

§ 113. Injuries to personal property.

The jury should have found for the appellant, the value of the horse, unless it was killed by appellee in repelling an assault made on them by him, which could not have been successfully resisted by the use of less force than was resorted to by them.

Evans v. Littell, 5 Ky. Opin. 650.

In a suit for breach of contract in not receiving certain personal property sold and tendered, the measure of damages is the difference between the market price and the contract price, at the time and place of the tender for which the defendants are liable; and the price for which the plaintiff actually sold the property is not at all material.

Saur, Schurman & Co. v. Sayres, 11 Ky. Opin. 52.

(C) BREACH OF CONTRACT.

§ 120. Failure to perform in general.

Where a contractor fails to complete a house, his compensation therefor should be the actual value of the house to the owner in its incomplete condition.

Smith v. Dressman, 5 Ky. Opin. 129.

The measure of damages for the breach of a contract to supply water is the probable cost of obtaining it.

Hazlip v. Austill, 12 Ky. Opin. 117.

§ 123. Defects in performance.

A contractor can not recover for defective work the full contract price because he can prove the work to be reasonably worth that much, without regard to the stipulated sum to be paid.

Cane v. Bergen, 3 Ky. Opin. 84.

§ 126. Failure to deliver property.

When a contract for the purchase of goods is broken by the vendor, the vendee may set off the amount of difference between the price to be paid for the goods and what they were worth.

Boone County Nat. Bank v. Clements, 9 Ky. Opin. 205.

In a suit to recover damages on account of failure to deliver goods bought, where sold at one point to be delivered at another, the difference between the value of the goods at the point of delivery and their value at the point of sale, less the expenses, costs of transportation, and insurance, constitute the measure of damages.

Bolinger v. Alter, Winston & Co., 9 Ky. Opin. 301.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

§ 128. Grounds of objection to amount.

If damages have been improperly awarded by the Court of Appeals, the remedy is by motion in that court which committed the error.

Muselman v. Parker, 7 Ky. Opin. 341.

§ 129. Injuries to the person.

§ 130.—In general.

Three thousand dollars' damages for the loss of a limb or permanent injury to it can not be regarded as excessive recovery or more than compensatory.

Louisville & N. R. Co. v. Connely, 13 Ky. Opin. 726.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(A) PLEADING.

§ 141. Allegations as to damage in general.

Where the averments of a petition do not import any certain and specific complaint that plaintiff sustained any damages which were natural and proximate to the breach of the contract complained of, but was for contingent and prospective profits or speculative damages, recovery can not be had.

Lane v. City of Louisville, 6 Ky. Opin. 178.

It is not necessary in a petition for damages to make an itemized statement of the injuries, and an instruction is not erroneous that the jury might consider as an element of damages the destruction of plaintiff's rails, even though the petition did not specify the amount of damages he had

sustained on this account, but did ask for damages on account of all the injuries complained of in the sum of \$2,000.

Chambers v. Seale, 9 Ky. Opin. 536.

§ 142. General or special damage.

Where one seeks to recover special damages, he must plead facts showing he is entitled thereto.

Bolinger v. Alter, Winston & Co., 9 Ky. Opin. 301.

(B) EVIDENCE.

§ 164. Admissibility.

In a suit for damages against a city, it is not error for the court to refuse to admit evidence to show that the city council was notified that hitchings on the wharf were insufficient, the liability of the city not depending upon the knowledge of the city officers that such hitchings were not sufficient.

Shinkle v. City of Covington, 8 Ky. Opin. 227.

(C) PROCEEDINGS FOR ASSESSMENT.

§ 193. Inquest on default or interlocutory judgment.

No judgment by default can be taken for damages without proof before a jury or commissioner.

Kilday v. Leytle, 3 Ky. Opin. 605.

§ 198.—Assessment by jury.

Under § 155, Civ. Code Prac., allegation of value or amount of damages should not be taken as true, but must be submitted to a jury.

Franks v. Martin, 7 Ky. Opin. 251.

§ 209. Instructions.

It was error to leave it discretionary to the jury to find such damages as the plaintiff sustained, not exceeding the amount claimed in the petition.

Reichman v. Stokle, 3 Ky. Opin. 295.

Where the jury were told that, in assessing damages, they may find in any amount which in the exercise of a sound discretion they may think the

plaintiffs entitled to, the latter part of the instruction is not objectionable, but when taken in connection with the preceding part, it conveys the idea that they have the right to find other than actual damages, and is erroneous.

McGuire v. Lorain, 5 Ky. Opin. 145.

DEATH.

II. ACTIONS FOR CAUSING DEATH.

(D) PLEADING AND EVIDENCE.

§ 74. Weight and sufficiency of evidence.

See Abatement and Revival; Homicide.

Of partner, see Partnership, VI.

Of party prior to judgment, see Judgment, § 860.

II. ACTIONS FOR CAUSING DEATH.

(D) PLEADING AND EVIDENCE.

§ 74. Weight and sufficiency of evidence.

Where a grantee gives to the deputy clerk his deed for record, and pays to such deputy money sufficient to pay the tax against said real estate and the cost of recording it, and the deed, when found, is in the clerk's office, the neglect of the clerk to endorse upon the deed, when the tax has been actually paid, will not destroy the legal effect of the conveyance, and the grantee may show by evidence that said taxes were paid and not endorsed on the deed.

Netherland v. Calvin, 10 Ky. Opin. 777.

DEBTOR AND CREDITOR.

See Assignments for Benefit of Creditors; Attachment; Creditors' Suit; Fraudulent Conveyances, § 24, 43; Garnishment; Insolvency.

Conveyance without consideration, see Fraudulent Conveyances, § 73.

Creditors of wife, see Dower, § 60.

Devise or bequest by debtor to creditor, see Wills, § 714.

Fund in hands of court commissioners, see Court Commissioners, § 3.

Indemnity insurance policy, see Insurance, § 591.
 Liability of new corporation for debts of old, see Corporations, § 543.
 Liability of wife's property for husband's debt, see Husband and Wife, § 118.
 New promise of bankrupt to pay discharged debt, see Bankruptcy, § 434.
 Preference of creditors, see Vendor and Purchaser, § 213.
 Priority of claims, see Exemptions, § 20.
 Remedies of creditors, see Corporations, § 547; Fraudulent Conveyances, III.; Guaranty, IV.; Principal and Surety, IV.
 Right of creditors to proceeds of homestead, see Homestead, § 58.
 Right of creditor under execution, see Execution, § 99.
 Rights and remedies of tenants' creditors, see Landlord and Tenants, § 245.
 Right of creditors of *cestui que trust*, see Trusts, § 150.
 Rights of creditor of devisees and legatees, see Wills, VII, I.
 Rights of creditors of heirs and testators, see Descent and Distribution, III., D.
 Rights of creditor of life tenant, see Descent and Distribution, § 154.
 Rights of creditors of trustee, see Trusts, § 136½.
 Rights of husband's creditors, see Dower, § 28; Husband and Wife, §§ 13, 36, 149, 171, 298.
 Rights of partnership creditors, see Partnership, § 187.
 Right to proceeds of insurance policy, see Insurance § 590.
 Right to subject interest under will, see Wills, § 867.
 Rule as to marshaling securities by creditors, see Marshaling Assets and Securities.
 Subjecting property fraudulently conveyed, see Fraudulent Conveyances, § 318.
 Title taken in name of debtor's son, see Fraudulent Conveyances, § 226.

DEBTS.

Extinguished by marriage of contracting parties, see Husband and Wife, § 10.

Of deceased person, see Descent and Distribution, III., C.

Secured by chattel mortgage, see Chattel Mortgages, § 109.

DECEDENTS' ESTATES.

See Descent and Distribution; Executors and Administrators; Wills.

DECISIONS.

Authority over former decisions of Court of Appeals, see Courts, § 91.
 Construing acts of Legislature, see Courts, § 107.

By court—Motive of judge, see Trial, § 387.

Finality of, see Appeal, § 66.

Intermediate and interlocutory decisions, see Appeal, § 67.

Of Court of Appeals—Authority of, see Courts, § 91.

On appeal, see Appeal, XVII, A.

Overruling previous decision—Effect, see Courts, § 100.

DECLARATIONS.

See Evidence, VIII.

Admissibility of, see Homicide, § 169.

Conclusiveness of, see Evidence, § 313.

Part of *res gestae*, see Evidence, §§ 121, 123.

DECREES.

See Judgment.

DEDICATION.

I. NATURE AND REQUISITES.

§ 16. Acts constituting dedication in general.

§ 18.—Recitals or descriptions in conveyances or contracts.

§ 19.—Designation in maps, or plats, and sale of lots.

§ 30. Acceptance.

§ 31.—Necessity.

§ 40. Evidence.

§ 41.—Presumptions as to dedication.

II. OPERATION AND EFFECT.

§ 47. Persons entitled to benefit of dedication.

§ 49. Extent of dedication.

§ 52. Title or right acquired.

I. NATURE AND REQUISITES.

§ 16. Acts constituting dedication in general.

Where an owner of land fences it with reference to a road thereon, and such road was kept in repair by the surveyor and hands from time to time appointed by the county court, and the owner of the land together with the surveyor kept it in repair, a dedication is shown.

Trustees of Princeton College v. Board of Trustees of Princeton, 7 Ky. Opin. 121.

Where a plat is filed purporting to dedicate a town lot to the public use, but before it is accepted by the public, the donor has withdrawn his proposal, the town fails to secure any title thereto.

Board of Councilmen of Uniontown v. David, 8 Ky. Opin. 183.

§ 18.—Recitals or descriptions in conveyances or contracts.

When grantors own land not platted, and convey the same as a tract, referring in the deed to a named street and to the location of portions of the lands on either side of such street, but not making the street a boundary, they do not thereby dedicate the street to the public, since the reference to the street in the deed was a mere matter of description.

City of Louisville v. Hall, 8 Ky. Opin. 327.

§ 19.—Designation in maps, or plats, and sale of lots.

If a street is laid off and lots sold bordering upon it the purchaser takes the lot with the right to the use of the street, and this will amount to a dedication of the street to the use of the public; but an alley, known as a blind alley, which does not run from street to street, but is a passageway only for the use of the property bordering upon it, and not for the use of the entire public, when laid out is not dedicated to the public, but may be closed by its owners at their pleasure; and such an alley may not be improved by the city and the adjoining property assessed for such improvement.

Ballard v. Gleason, 10 Ky. Opin. 621.

Where a proprietor has dedicated streets to the public by filing a plat and selling lots, it is not required that the public shall be in the actual occupation of such streets in order to show its acceptance of the dedication, but it is enough that the public has done that from which its acceptance may be inferred.

Ballard v. St. Cloud & Co., 10 Ky. Opin. 343.

When the proprietor of land within the boundary of a city lays it out into lots and sells them, leaving intervening strips of land corresponding to established and improved streets, projecting toward them, it will amount to a dedication of such strips for public use as streets.

Ballard v. St. Cloud & Co., 10 Ky. Opin. 343.

Where one prepares a map of an addition to a city, which is acknowledged and recorded, and on the back of such plat he also places a map and plat of an addition of the real estate adjoining that platted, and no acknowledgement is made on the back of such plat, but it is recorded, it amounts to a dedication of the streets in both of said additions; and if a street thus dedicated is accepted by the public and used as a highway, it belongs to the city and can not be claimed by one owning adjoining real estate.

Davis, Moody & Co. v. City of Louisville, 11 Ky. Opin. 965.

The intention of the owner of real estate to dedicate a part of it to the public for streets is shown when the owner plats such ground, laying out streets and alleys, records his plat and sells off lots along the same; and that the public has accepted such a dedication is shown by the use of it by the public, the making of a contract for its improvement and the erection of gas posts along it.

Southgate v. Regenthal, 13 Ky. Opin. 921.

Where the owner of real estate plats it into lots, streets and alleys and files his plat, his acts amount to a dedication to the public which when accepted by the public by being used

become streets and alleys, and when land is laid off into lots, streets and alleys, and lots are sold, each lot owner has a right not only to use the streets as ways of ingress and egress, but to have them thrown open to the use of the public.

Southgate v. Regenthal, 13 Ky. Opin. 921.

One who has platted his ground in a town and filed the plat with the proper officer, clearly showing defined streets and alleys, has thereby precluded himself from setting up any adverse claim against the town to such streets and alleys, since the filing of his plat shows a dedication of the streets, and the claims of rent by the town trustees and his actual payment for a long time shows an acceptance on the part of the public.

Tanner v. Trustees of Sherburn, 13 Ky. Opin. 1088.

§ 30. Acceptance.

§ 31.—Necessity.

A dedication to the public of a highway is not complete until there is an acceptance by the public; and a public highway may be established covering a strip of land tendered by the owner for a public passway, without a formal acceptance.

Moore & Mason v. Sparks, 8 Ky. Opin. 408.

It is necessary to a dedication to the use of the public, that there should not only be a clear indication of an intention to invest the public with the right to use the property, but it must also appear that the dedication was accepted on the part of the public by some one authorized to act for it.

Skiles v. Trustees of Richpond, 10 Ky. Opin. 148.

§ 40. Evidence.

§ 41.—Presumptions as to dedication.

Proof of dedication and acceptance may be by facts or circumstances sufficient to authorize an inference of the intention to give or to accept.

Skiles v. Trustees of Richpond, 10 Ky. Opin. 148.

II. OPERATION AND EFFECT.

§ 47. Persons entitled to benefit of dedication.

Where property is dedicated for a certain purpose and is accepted by those to whom made, and they have held adverse possession thereof for many years and are then dispossessed under a writ issued in a cause to which they were not parties, such parties, or some of them for themselves and others entitled thereto, have a right to maintain an action to secure such rights and preserve the dedicated property for the benefit of themselves and all others entitled under the terms of the dedication to participate in its use.

Chinn v. Gould, 10 Ky. Opin. 453.

§ 49. Extent of dedication.

Where an owner of land platted it into lots designating a space between them as a street, the sale of lots on either side of the space designated as a street carries a legal title to the purchaser to the middle of such space, subject to public easement.

Grayson v. Stengel & Renther, 3 Ky. Opin. 368.

§ 52. Title or right acquired.

As the proprietor parted with the legal title to one-half of the space in front of each lot as he respectively conveyed them, and only retained it in trust for the purchasers when the legal title was not conveyed, and as this gave the purchaser the right to have said space opened and improved so as to facilitate the ingress and egress to and from their lots, no legal title by such dedication passed to the city, but only the legal custody and control of it as a public highway, he could not reserve the right to make the city pay for this custody so far as he parted with the title to the lots.

Grayson v. Stengel & Renther, 3 Ky. Opin. 368.

Where an owner of land platted the same into lots leaving a space between them, and sold lots on either side of the space it amounted to the dedication of such space to the public use, and a reservation against the city availed nothing, since he retained

the legal title to the street in front of the unsold lots charged with the same public use.

Grayson v. Stengel & Renther, 3 Ky. Opin. 368.

Where an owner of land platted it into lots leaving a space between the lots for a street and sold lots on each side of the street, the city is a representative of each citizen, and the public, necessarily becomes the trustee and custodian of such space, and the proprietor has no claim against the city in its corporate capacity in regard to such space.

Grayson v. Stengel & Renther, 3 Ky. Opin. 368.

Where an owner of land platted the same into lots leaving a space between them as a street and sold lots on either side of such space, in so far as the owner did not sell or convey lots he retained the legal title to such space charged with the easement of the public, and with legal right to all accretions to himself.

Grayson v. Stengel & Renther, 3 Ky. Opin. 368.

DEEDS.

I. REQUISITES AND VALIDITY.

(A) NATURE AND ESSENTIALS OF CONVEYANCES IN GENERAL.

- § 8. Title or interest of grantor.
- § 10. Parties.
- § 12.—Capacity to convey.
- § 14. Consideration.
- § 17.—Sufficiency.
- § 19.—Failure of consideration.
- § 20. Particular modes of conveyances.
- § 25.—Quitclaim.

(B) FORM AND CONTENTS OF INSTRUMENTS.

- § 28. Forms and parts of deeds of conveyance in general.
- § 33. Recitals.
- § 34.—In general.
- § 35.—Consideration and receipt thereof.
- § 37. Description of property.
- § 38.—Certainty in general.

(C) EXECUTION.

- § 44. Mode and requisites in general.
- § 45. Signature or subscription.

(D) DELIVERY.

- § 55. Sufficiency.
- § 56.—In general.
- § 59.—Record or delivery for record.
- § 63. Acceptance.
- § 65.—Sufficiency.

(E) VALIDITY.

- § 68. Capacity and assent of parties in general.
- § 69. Mistake.
- § 70. Fraud and misrepresentation.
- § 72. Undue influence.

II. RECORDING AND REGISTRATION.

- § 79. Purpose and scope of requirements in general.
- § 82. Necessity as between parties to instrument.
- § 83. Instruments entitled to record.
- § 86. Sufficiency.
- § 87. Effect as between parties to instrument.

III. CONSTRUCTION AND OPERATION.

(A) GENERAL RULES OF CONSTRUCTION.

- § 90. Application to deed in general.
- § 93. Intention of parties.
- § 94. Merger of previous agreements.
- § 95. Language of instrument.
- § 96. Recitals.
- § 99. Construing instruments together.
- § 101. Construction by parties.

(B) PROPERTY CONVEYED.

- § 111. Construction in general.
- § 113. Particular words or terms.
- § 114. Particular description.
- § 115. Erroneous description.
- § 117. Appurtenances.

(C) ESTATES AND INTERESTS CREATED.

- § 120. Creation by deed in general.
- § 123. Particular words or terms.
- § 124. Fee simple.
- § 126. Conditional fees.
- § 128. Application of rule in Shelley's case.
- § 129. Life estates.
- § 130. Reversions.
- § 133.—Vested or contingent.
- § 134. Conditional limitations.

§ 136. Joint tenancy or tenancy in common.

(D) EXCEPTIONS AND RESERVATIONS.

§ 137. Nature and creation of exceptions.

§ 140. Construction and operation of exceptions.

§ 152. Construction and operation of conditions.

(E) CONDITIONS AND RESTRICTIONS.

§ 146. Validity of conditions.

§ 147.—In general.

(F) LOSS OR RELINQUISHMENT OF RIGHTS.

§ 178. Rescission by parties in general.

IV. PLEADING AND EVIDENCE.

§ 184. Pleading.

§ 185.—In general.

§ 191. Presumptions and burden of proof.

§ 194.—Delivery.

§ 198. Admissibility of evidence.

§ 199.—Execution, existence and identity.

§ 202.—Consideration.

§ 205. Weight and sufficiency of evidence.

§ 207.—Execution, existence and identity.

See Acknowledgment; Covenants; Fraudulent Conveyances; Mortgages. Absolute deed as mortgage, see Mortgages, § 31.

Alteration of deed, see Alteration of Instruments, § 5.

Breach of covenant of seisin, see Covenants, § 94.

By married women, see Husband and Wife, § 179.

Cancellation of deed, see Cancellation of Instruments, § 3.

Correction of mistake, see Reformation of Instruments, § 13.

Defeasible fee, see Wills, § 602.

Deficiency in land sold, see Vendor and Purchaser, § 165.

Estoppel by, see Estoppel, § 101.

In suit by guardian, see Guardian and Ward, § 162.

Limitation of action to set aside deed, see Limitation of Actions, §§ 36, 60.

Parol evidence of warranty, see Evidence, § 390.

Proof of lost deed, see Lost Instruments, § 13.

Quantity of land conveyed, see Vendor and Purchaser, IV, C.

Recitals of deed as evidence, see Evidence, § 353.

Recording, see Vendor and Purchaser, § 350.

Reformation of, see Auctions and Auctioneers, § 8; Reformation of Instruments, § 5.

Sheriff's deed, see Execution, §§ 305, 309, 311.

Sufficiency of, see Vendor and Purchaser, § 149.

Surrender of deed does not divest title, see Husband and wife, § 190.

When operate as mortgages, see Mortgages, §§ 1, 31.

Without consideration void as to creditors, see Fraudulent Conveyances, § 74.

I. REQUISITES AND VALIDITY.

(A) NATURE AND ESSENTIALS OF CONVEYANCES IN GENERAL.

§ 8. Title or interest of grantor.

Where one purchases land and the seller conveys it to him by deed in fee simple and the deed is delivered to and accepted by the grantee, it is effective, and the delivery to such grantee at his request of a second deed thereafter conveying to him a life estate with the fee to his children by his first wife is void, and the destruction of the first deed after its acceptance will not change matters any.

Martin v. Martin, 12 Ky. Opin. 283.

§ 10. Parties.

§ 12.—Capacity to convey.

One has capacity to convey land by deed when at the time the deed is executed she is mentally capable of understanding and comprehending the character, object and nature of the contract, even though at the time she is sick and labors under the delusion that she is bewitched and her mind to some extent is affected.

Richardson v. Hunt, 12 Ky. Opin. 618.

§ 14. Consideration.

Either party to a deed may show by parol evidence that the actual consideration is different from that stated

in the deed, and the acknowledgment in a deed of the receipt of the consideration is only *prima facie* evidence of payment, which may be rebutted.

Beverly v. Noel, 12 Ky. Opin. 120.

§ 17.—Sufficiency.

Love and affection are considerations sufficient upon which to base a deed of conveyance, and no one can successfully assert that the deed is made to defraud creditors except the creditors themselves.

Adkins v. Adkins, 13 Ky. Opin. 971.

§ 19.—Failure of consideration.

Where a deed contained the following provision, "said vendors reserve for their use, etc., a sufficiency of said land, for their support and maintenance during their lives;" and arbitrators having been appointed, some thirty acres were set aside for use of R. and wife; and at his death, the wife entered into an agreement with B., the purchaser, "conditioned that when the surplus on hand, etc., shall be used by me as a support, etc., he will on request of me, or my agent, lay off a sufficiency of land according to the arbitration bond now filed in H.'s office, according to the requirements of said bond," and whereupon she surrendered to B. the land; in the absence of the filing of the bond or proof, and no provision being made for the support of the wife, it was without consideration for the surrender of the land.

Royse v. Blair, 2 Ky. Opin. 528.

Conveyance of the wife's land to the husband's father and the reconveyance by the father to the husband did not vest the wife's title in her husband, as there was no consideration therefor.

Luke v. Gunnell, 1 Ky. Opin. 258.

§ 20. Particular modes of conveyance.
§ 25.—Quitclaim.

A deed purporting to be a sale of all the interest of the grantors in the estate of their grandfather's, was held to be binding on the grantors.

Whipp v. Sweeney, 6 Ky. Opin. 232.

(B) FORM AND CONTENTS OF INSTRUMENTS.

§ 28. Forms and parts of deeds of conveyance in general.

The office of the habendum in a deed is to determine the estate or interest granted, and the object in construing a deed is to ascertain the intention of the parties to it, and this is to be arrived at by considering the entire instrument.

Heingley v. Harris, 10 Ky. Opin. 612.

§ 33. Recitals.

A deed contains two distinct covenants, the first a covenant of seizin, and the other an ordinary covenant of general warranty.

Fennessey v. Abbott, 5 Ky. Opin. 42.

§ 34.—In general.

The attestation clause of a deed adds nothing to its force, and the recital in a deed that a married woman is a party to a conveyance where the deed purports to be a conveyance by the husband alone, is contradicted by the face of the deed, and it must be treated as if she merely had signed it without any mention of her name in its body.

Collins v. Gardner, 10 Ky. Opin. 346.

§ 35.—Consideration and receipt thereof.

An acknowledgment in a deed of receipt of the consideration recited therein is only *prima facie* evidence thereof, and may be overthrown by clear and satisfactory evidence that the consideration had not been paid.

Niblack v. Niblack, 6 Ky. Opin. 545.

§ 37. Description of property.

§ 38.—Certainty in general.

A conveyance of land by deed, which recites that it was "twenty-five acres of tract more or less, of about fifty acres sold to appellant and his brother," is void for uncertainty of description.

Pinkston v. Pinkston, 1 Ky. Opin. 98.

Under a contract for exchange of lands, a deed made subsequent there-

to in which the property is misdescribed will be corrected by a chancery proceeding, a mere misdescription in a deed not being a breach of warranty nor grounds for rescission of a contract between the parties.

Bates v. James' Heirs, 2 Ky. Opin. 206.

Where a description in a deed is so vague and uncertain that the vendee can not learn from it what land he takes under it, the deed is void for uncertainty.

Bidwell v. Fackler, 8 Ky. Opin. 97.

Where a description in a deed runs to the Kentucky river, it will be construed to mean to low water mark of such river.

Claxton's Admr. v. Simpson's Admr., 9 Ky. Opin. 297.

The natural objects mentioned in a description in a deed or executory contract will control courses and distances.

Ball v. Pursefull, 11 Ky. Opin. 340.

When a patent conveys land by monuments and streets and bounds, the patent calls must be followed even though to do so may decrease or increase the area of land over that mentioned in the patent or deed.

Courito v. Kitchen, 12 Ky. Opin. 616.

(C) EXECUTION.

§ 44. Mode and requisites in general.

A deed which is not acknowledged, proven, or witnessed, amounts merely to a bond for title as regards strangers, although valid between the parties.

Craig v. Cromwell, 7 Ky. Opin. 675.

It is the execution and delivery of a deed that passes the legal title, and not the authentication.

Goodman v. Bolton, Vass & Land, 3 Ky. Opin. 135.

The execution of a deed consists not only of its signing and acknowledgment, but also of its delivery to and acceptance by the grantee; and where there has been no acceptance

of a conveyance the deed is of no effect.

Alsop v. Weir, 13 Ky. Opin. 758.

§ 45. Signature or subscription.

The simple acknowledgment of a deed without signing passes nothing.

Janny v. Dills, 3 Ky. Opin. 492.

(D) DELIVERY.

§ 55. Sufficiency.

§ 56.—In general.

Where a deed to real estate is duly delivered to the grantee, it carries title, and its destruction does not empower the grantor to make a second deed, for he then has nothing to convey.

McAllister v. Bryan, 8 Ky. Opin. 440.

Where the owner of land who has aided his daughter in raising her family and assisted one of his grandsons, attempts by deed to convey his land to such daughter and grandson, and the land embraces practically all of his estate, leaving nothing for his other deserving children, and there is great doubt whether such deed was ever delivered, the court will be inclined to hold that there was no delivery, since the execution of a deed consists both of its signing and delivery.

Tinsley v. Tinsley, 13 Ky. Opin. 660.

§ 59.—Record or delivery for record.

The acknowledgment and recording of a deed by the grantor constitutes strong evidence of a delivery of the deed.

Hamilton's Assignee v. Winston, 10 Ky. Opin. 355.

The presumption of delivery of a deed arising from its acknowledgment and recording, casts the burden of disproving its delivery upon the party claiming its non-delivery.

Hamilton's Assignee v. Winston, 10 Ky. Opin. 355.

§ 63. Acceptance.

The acceptance of a deed requires the grantee to look to its covenant in case of a defect of title.

Wilson v. Maize, 6 Ky. Opin. 595.

If by deed a valuable estate is granted, which is of great benefit to the grantee, the legal presumption is that it was accepted.

Smith v. Hardin, 1 Ky. Opin. 546.

Where a deed is duly and legally executed, the law presumes that the beneficiary therein will accept it.

Littell v. Reed, 4 Ky. Opin. 326.

The registration of a deed is presumptive evidence of its acceptance by the grantee, and the burden of proof is on the party denying acceptance.

Abbott v. Letteral, 7 Ky. Opin. 470.

A purchaser of real estate receiving a bond for a deed, upon paying for the land, is not bound to accept a deed from his vendor unless the vendor's wife relinquishes her potential right to dower.

Phillips v. Robards, 9 Ky. Opin. 626.

§ 65.—Sufficiency.

Where a deed is made to a number of grantees and delivered to one of them, who accepts its delivery to him, acceptance by him is delivery to and acceptance by all.

Knight v. Berry, 10 Ky. Opin. 336.

(E) VALIDITY.

§ 68. Capacity and assent of parties in general.

Where a deed was given a brother to the undivided one-half interest in land descending to a sister, the latter of whom was proven at the time to have been irrational, and the deed recited a consideration of love and affection, and to carry out the wish of their father, and in a subsequent suit by the grantor's children to vacate same, by reason of their mother being of unsound mind, it was held that the deed was void, as not being the deliberate act of a discreet and intelligent person.

Newman v. Powell, 4 Ky. Opin. 256.

Where a father, enfeebled in body and mind, so as not to be able to care for himself, gave a deed to his whole estate to a son from whom thereto-

fore he had been estranged, for no consideration except his support for life, and after making the deed he tried to sell some of the land, saying he had only conveyed it during life to his son, it constitutes incapacity and undue influence.

Jones' Heirs v. Jones, 3 Ky. Opin. 683.

A deed by a grantor to three of his children, and to the exclusion of others, executed during the life of the deceased, and at the time when in full control of his mental faculties, and in accordance with an oft expressed desire, will be held binding, though it covers all the property of the grantor.

Bates v. Bates, 3 Ky. Opin. 235.

Where the evidence showed a sale of twenty-six acres of land, worth \$20.00 per acre, subject only to the widow's dower, and sale of a life estate of considerable value, in consideration of a diseased horse, which shortly died, in view of the grossly inadequate consideration, the grantor's advanced age, distressed and weak mental condition, and being overreached by the grantee, the transaction can not be upheld by a court of equity.

Williams v. Jones, 4 Ky. Opin. 334.

Where in the year 1867 R. made her last will and testament by which she devised all of her estate to her two children, A. and C., for life, with remainder to their children, and on the 16th day of April, 1869, the devisor executed a deed to her son, A. R., one of the appellants, by which she conveyed all of the property devised to C. to him, in trust for his children, and for months previous, and about the date of this deed, her many neighbors, who had known her for many years, testified that her mental faculties were much impaired, and to such an extent, in the opinion of many, as to render her incapable of executing such an instrument; and she was then residing with her son, A. R., the deed should be cancelled.

Rent v. Cox, 5 Ky. Opin. 403.

The finding of a jury impaneled to inquire into the sanity of the grantor of land in the year 1869, that the

grantor had sufficient mental capacity to execute the conveyance, is entitled to great weight in determining his mental condition in the year 1868.

Allen v. Moore, 7 Ky. Opin. 595.

A parent has the absolute right in disposing of his property to give to some of his children all of it and to others nothing, but when he is old and infirm and not able to understand or comprehend how he is disposing of his property, such facts may turn the scale and establish his mental incapacity to dispose of his property.

Bramel's Admr. v. Bramel, 8 Ky. Opin. 614.

A father having mental capacity, and where no undue influence is used upon him, may legally convey the major portion of his real estate to one child to the exclusion of the other children.

Huff v. Dehaven, 8 Ky. Opin. 633.

The deed of an insane person is not necessarily void, as such deeds stand on the same ground with the deeds of infants, and courts should set them aside only when justice requires it, and then only on terms just to all parties.

Thompson v. Glinn, 8 Ky. Opin. 886.

A deed of conveyance made by a grantor of doubtful mental capacity, which has stood for more than twenty-five years, and the property has been conveyed by the grantee, who purchased the same for a valuable consideration without any notice of the fraud of his grantor, if there was fraud in securing the conveyance, will not be set aside because of the feebleness of the original grantor's mind.

Wayne v. Foote, 10 Ky. Opin. 377.

One who has mind enough to understand the nature and character of the transaction he is consummating in executing a deed, has mental capacity sufficient to make such a deed, and the same is valid.

Garner v. Garner, 12 Ky. Opin. 1.

If a deed is executed by one incompetent to make it by reason of mental incapacity, the title will not pass, however strong the equities of

the grantee or his ancestor may be; the only remedy would be to assert those equities and not the right to the real estate.

Huskinson v. Dunigan, 13 Ky. Opin. 686.

The burden of showing mental incapacity of a grantor at the date of the execution of a deed is on the person alleging such incapacity.

Alsop v. Weir, 13 Ky. Opin. 758.

Where a father eighty years of age, having eight children, conveys nearly the whole of his estate to five of the children, thereby depriving the other children of anything, such unreasonable disposition is evidence of want of mental capacity on the part of the grantor.

Clark v. Roberts, 13 Ky. Opin. 915.

§ 69. Mistake.

Where a father intending to divide all his lands to his children, instructed his draftsman to make out deeds to each of his daughters, and only one of the deeds was read over to him before signing all; and afterwards it was discovered that one of the deeds was made to the husband of one of the daughters and this only shortly before her death; and the property was recognized by the husband as belonging to his wife, during her life; it was such a mistake as will authorize the court to cancel the deed as to the husband.

Weller v. Perry, 2 Ky. Opin. 511.

Where the owner of real property has the boundaries thereof fixed by survey, and then conveys to a purchaser according to such boundaries, who conveys same to a person for a valuable consideration, who has no notice or knowledge of a mistake in the acreage first conveyed, the first grantor has no cause of action against the last purchaser.

Jewell v. Howard, 8 Ky. Opin. 107.

Where persons who are endorers for another receive conveyance of land from him to indemnify them on account of such indorsement compromise with the creditor by conveying the land to him and making pay-

ments besides for a full discharge from such debt, and after this has stood more than ten years it is discovered that there is a less number of acres than was thought to be in the conveyance, it is too late to correct the mistake in a court of equity, especially since the grantors received nothing for making the conveyance except the release of a part of them upon indorsements.

Leshagger v. Bonta, 9 Ky. Opin. 595.

§ 70. Fraud and misrepresentation.

Where the proof fails to show any fraud on the part of the grantee in the procurement of a deed, or that the grantor did not thoroughly understand its contents, and voluntarily executed it, the court will not set it aside for minor causes.

Clark v. Beauchamp, 2 Ky. Opin. 96.

The only principle upon which appellant was entitled to relief is upon the restoration of the land he obtained from the appellee, and an equitable interest and settlement of rents and improvements by each party.

Benton v. Jameson, 1 Ky. Opin. 179.

A court of equity will not rescind a deed conveying an undivided one-seventh of a tract of land of which the vendor was an heir, which was supposed to contain 165 acres, upon the ground of misrepresentation, where one-seventh was all that was conveyed.

Howard v. McCollan, 3 Ky. Opin. 516.

Where appellant neither alleged nor proved that his acceptance of the deed and warranty was induced by fraud, nor that insolvency or non-residence rendered the covenant of warranty unavailable, nor that any breach of the warranty had occurred by eviction; appellant was entitled to no relief, unless upon the ground of fraud superinducing the contract.

Henning v. Henning, 5 Ky. Opin. 20.

§ 72. Undue Influence.

Where an old person, weak and infirm in body and mind, owning but

one piece of property, is induced to convey it to his half-brother, who soon thereafter drives him away by cruel treatment, and the evidence of the grantor shows that he did not know he was conveying his real estate and that he received no consideration for such conveyance, and the grantee fails to offer his evidence, such a conveyance will not be upheld.

Huban v. Huban, 11 Ky. Opin. 197.

II. RECORDING AND REGISTRATION.

§ 79. Purpose and scope of requirements in general.

Constructive notice arising from the recording of a voluntary conveyance is not sufficient to effect the conscience of a bona fide purchaser, actual notice being necessary for this purpose.

Garrett's Heirs v. Powell, 5 Ky. Opin. 486.

The deed operated as constructive notice from the time it was lodged in the clerk's office for registration.

Macria v. Linder, 1 Ky. Opin. 405.

Where land is conveyed by covenant of warranty by a bond for title, reserving the legal title in the covenantor, it is both notice and binding on subsequent purchasers as privies.

Bright v. Sanford, 1 Ky. Opin. 186.

The recording of a deed of trust, conveying a life estate, is constructive notice to remaindermen, and will not be abrogated after being acted on for nine years without objection.

Bowman v. Utley, 1 Ky. Opin. 443.

A deed acknowledged and lodged for record the day of its date is constructive notice to the world as to who holds the legal title.

Ott v. Ott's Admrs., 2 Ky. Opin. 114.

The authentication and recording of deeds is for the purpose of notice to the community, that innocent purchasers and creditors may be protected.

Goodman v. Bolton, Vass & Land, 3 Ky. Opin. 135.

§ 82. Necessity as between parties to instrument.

Deeds are not equitable titles until lodged in the proper office for record, and an execution can not be levied on such title without the consent of the debtor.

Hart v. Smith, 1 Ky. Opin. 311.

Whether a wife has joined in the execution of a deed or not, if such deed is never recorded it is void as to the wife.

Claxton's Admr. v. Simpson's Admr., 9 Ky. Opin. 297.

It is not necessary that a deed be recorded to invest a grantee with title, and where a deed has been signed, acknowledged and delivered, the title passes and the destruction of such deed by consent of the grantor and grantee will not reinvest the grantor with title.

Beasley v. Hilderbrand, 9 Ky. Opin. 933.

§ 83. Instruments entitled to record.

A deed is invalid as against creditors unless acknowledged or proved according to law and lodged for record and recorded in the clerk's office, and no deed shall be held to be legally lodged for record until the tax is paid thereon.

Haydon v. Bamberger, 8 Ky. Opin. 501.

Until the fees are paid for recording deed, it is not legally lodged for record, even though left with the clerk, but where the clerk actually records a deed, upon which the fees have not been paid it is valid as against purchasers and creditors from the date it was recorded.

Haydon v. Bamberger, 8 Ky. Opin. 501.

The clerk is not authorized to record a deed without direct proof of its execution, although such deeds may sometimes be admitted in evidence as ancient writings.

Harlan v. Hardin, 8 Ky. Opin. 587.

§ 86. Sufficiency.

Where a deed is legally lodged for record, all persons from that time are presumed to have notice of all

the stipulations of that deed affecting the title conveyed by it.

Baker v. West, 9 Ky. Opin. 751.

§ 87. Effect as between parties to instrument.

When a deed is found on record in the proper office the fact is prima facie evidence of its acceptance by the grantee.

Goggin's Exrx. v. Hutchinson, 9 Ky. Opin. 866.

III. CONSTRUCTION AND OPERATION.**(A) GENERAL RULES OF CONSTRUCTION.****§ 90. Application to deed in general.**

As between the parties to a deed, the recitals therein contained, are in general conclusive, but not so as to strangers.

Rosa v. Burkley, 3 Ky. Opin. 66.

Where the court is satisfied, from an examination of a written instrument, that to follow a rule of construction will defeat the intention of the parties to it, such a rule will not be followed.

Davis v. Hardin, 10 Ky. Opin. 674.

The contents of a deed alone must control the construction to be given it, when there is no ambiguity appearing upon the face of the instrument; but the chancellor for the purposes of aiding in the construction is allowed to ascertain the nature and extent of the interest each party to the conveyance had in the land conveyed.

Clarkson v. Allison, 12 Ky. Opin. 177.

§ 93. Intention of parties.

The object of all rules of construction of a deed is to effectuate the intention of the parties to it, and a deed will convey a wife's interest where she is named with her husband as party of the first part, and she with her husband duly signs and acknowledges such deed.

Ferrill v. Cleveland, 13 Ky. Opin. 198.

§ 94. Merger of previous agreements.

A deed made and accepted, in pur-

suance to a title bond, for the land embraced therein, is a discharge and merger of the latter.

Hudson v. Letcher, 3 Ky. Opin. 292.

§ 95. Language of instrument.

In construing deeds, regard must be had to their language, the situation of the land, and other circumstances surrounding the parties and the land conveyed.

Gano v. City of Covington, 10 Ky. Opin. 551.

§ 96. Recitals.

The recitals in a deed import a valuable consideration paid for the land as between the parties to the deed, and also to strangers when the deed is prior in date to the equity asserted against it, otherwise when the equity asserted is prior in date.

Spillman v. Swango, 10 Ky. Opin. 107.

The recital in a deed that it was founded on a valuable consideration is good and binding between the parties to it, but is no evidence that such consideration has been paid in a contest between a stranger to the conveyance and the parties to the deed.

Sowards v. Commonwealth, 10 Ky. Opin. 151.

§ 99. Construing instruments together.

The plat on the back of a deed and referred to in it is a part of the deed and will be construed together with the other parts of the deed.

Cincinnati Southern R. Co. v. Hogan, 13 Ky. Opin. 1096.

§ 101. Construction by parties.

Where the owner of real estate, about to marry a second time, or soon after such marriage, makes a deed to himself and wife of the real estate, providing that his said wife and himself should have the land during their lives with remainder to their children, including a son of his wife by a former marriage; and years after the death of the husband, and after such child, and a child of the marriage, and their mother, each being over twenty-one years of age, have partitioned the land among themselves, it is too late for either of said own-

ers or their heirs to put a different construction on such original marriage deed, and claim interests in proportions other than those claimed at the time of their partition of the land.

Oldham v. Armstrong, 13 Ky. Opin. 993.

(B) PROPERTY CONVEYED.

§ 111. Construction in general.

Where a deed to the grantor's daughter passed the legal title to her, and was binding between the parties; but a subsequent purchaser or creditor, without notice, might avoid it, the statement in an after-made deed by the grantor to the husband of his daughter, that "the land herein conveyed is the same property given to my daughter," was sufficient to put subsequent purchasers on inquiry as to the title, and the mere surrender of a deed does not divest a married woman of her title to land.

Smith v. Hardin, 1 Ky. Opin. 546.

Where a deed for a consideration of \$3,957 describes the land by metes and bounds as containing 158 acres, 1 rod and 7 poles, more or less; and an action was brought for an unpaid balance due of this sum, and defendant filed an offset, claiming to have received only 148 acres, and that the land was sold at \$25 per acre, and not for the bulk sum as shown by the deed; and the evidence was contradictory, the court held that, regardless of the fact of the sale which seemed from the evidence was by the acre, it did not appear that there was an agreement that either party should account for deficiency or excess in quantity, and the deed should be made absolute.

Morehead v. Whitmer, 1 Ky. Opin. 433.

When the vendor knows that the tract of land he is selling does not contain the number of acres represented, he can not shield himself from the presumed fraud or mistake by adding the words "more or less."

Griffith v. Conway, 2 Ky. Opin. 330.

Where land is sold by the tract, the statement of the quantity followed by

the "more or less" can not invalidate the sale.

Allen v. Bowen, 2 Ky. Opin. 84.

Where a tract of land to which appellant executed a deed under which he claimed, contained only 205 acres, and he represented the tract to appellees as containing 250 acres, which representation may be inferred from the fact that in his deed he conveyed it as containing 250 acres, more or less; the appellant had reasons to believe that there were not 250 acres in the tract, and he should, therefore, be made responsible for the deficit, at the price, pro rata, at which he sold it.

Priessler v. Shwaberton, 3 Ky. Opin. 620.

A deed of conveyance, containing an undivided one-seventh part of a tract of land, of which the vendor was heir and supposed to contain 164 acres, will not be set aside, though upon the allotment, only 145 acres was found to be the vendor's portion.

Howard v. McCollam, 3 Ky. Opin. 516.

Where appellee being the vendee of W, who was vendee of F, who was vendee of Wherritt, who was vendee of C, of a tract of land described by metes and bounds in the several deeds, but recited that it contained 164 acres, "more or less," when it contained less than 130 acres; and appellant knew nothing of its boundaries, but F did, and attempted to make the purchase by the acre, which appellant refused, and he bought by the gross, with the words "more or less" annexed to the designation of the quantity; and appellee sued C, in equity, on the covenant of general warranty in his deed to appellant; and C proved by appellant that it was understood between him and C that there was a deficiency; and appellee then by amendment sued appellant on his deed to F, and dismissed as to C, the sale was in gross and not by the acre.

Wherritt v. Durbin, 3 Ky. Opin. 619.

Where, by the terms of a deed, a house was divided equally between the claimants at the time the deed was

given to use by two families, a subsequent action can not be maintained to recover for use of a portion of the house which was vacant at the date of the deed.

Lyons v. Cassidy, 4 Ky. Opin. 400.

Where one sells and conveys real estate, being one hundred ten acres, even if the parties talked about the adjoining seven and one-half acres as part of the boundary, if in fact said tract is not a part of the written description, and the grantee received in excess of the one hundred ten acres, the conveyance can not be construed to have included the seven and one-half acres unless some fraud or mistake be legally shown and the contract reformed accordingly.

Mouser v. McInteer, 12 Ky. Opin. 567.

§ 113. Particular words or terms.

A deed, providing to "set aside for the said," etc., by a husband, who afterwards sues for a divorce, and in the decree for which is provided "all the property not disposed of at the commencement of the action which remain in kind, etc., should be restored to such party," is held not to be embraced therein, as it does not come in with the "undisposed of" property.

Williams v. Williams, 3 Ky. Opin. 363.

Where a trust deed contained the following wording, in reference to personal property conveyed therein, "All my personal property, consisting of all the stock of horses, cattle, sheep and hogs," and "all his farming utensils of every kind and description, except such property as is exempt by law from execution," it does not convey any personalty, except as actually described by the instrument, and does not cover all the personal property of the mortgagor.

Botts v. Norwood, 1 Ky. Opin. 511.

The wording of a trust deed which contains "all the personal property," consisting of, limits and defines the kind of personalty conveyed, and transfers all of each class named thereafter as constituting the person-

al property to be embraced in the deed.

Botts v. Norwood, 1 Ky. Opin. 511.

A conveyance by a father to his son of a valuable estate in consideration of his giving them a support, can not be inquired into by the other children after the death of the parent, no complaint by them nor the other heirs having been made during the life of the parents.

Bradford, Admr., v. Kirby, 2 Ky. Opin. 587.

A conveyance by deed from father to son, with a warranty of title against "himself, his heirs and all persons claiming under him," will operate as an estoppel, not only as to the claims of the grantor himself, but against his devisees, heirs and representatives; and is not subject to collateral attack, except for fraud, or force in the procurement thereof.

Dehoney's Exr. v. Dehoney, 2 Ky. Opin. 420.

§ 114. Particular description.

A description in a deed is sufficient when it is definite enough to enable the officer to identify the lot without reference to any other paper, and it is not necessary that it be so minute as to enable a person without any previous knowledge or inquiry whatever to find and recognize it.

Knott v. Johnston, 11 Ky. Opin. 271.

§ 115. Erroneous description.

The boundary of land described in the deed differs essentially from that described in the patent, but the size of the tract, the watercourse upon which it lies, the land it adjoins and the further fact that it is described as the same land covered by the patent, tends to establish the conclusion that the intention was to convey all the land embraced in the patent.

Crider v. Cobb, 4 Ky. Opin. 632.

A conveyance of real estate may be corrected and made to describe the land actually sold when the description in the deed is incorrect, whether the misdescription was the result of fraud or mistake or both combined.

Savage v. Yellman, 12 Ky. Opin. 157.

A deed for more land than the grantor owns operates to convey so much as he can lawfully convey.

Buchanan v. The Crucible Steel Casting & Metal Co., 12 Ky. Opin. 206.

§ 117. Appurtenances.

The grant of a mill carries with it the use of the water by which it is run, the flood gates, dam and all things necessary for its use, as well as the land on which it stands and that over which it projects.

Ball v. Pursefull, 11 Ky. Opin. 340.

(C) ESTATES AND INTERESTS CREATED.

§ 120. Creation by deed in general.

The owner of land in fee simple can legally sell and convey the soil to one person, the growing timber thereon to another and the minerals to a third, and by ordinary deed invest the vendees with the several interests so secured and yet so possessed as to render their respective estates enjoyable.

Kincaid v. Magowan, 12 Ky. Opin. 673.

§ 123. Particular words or terms.

While the word "children" is ordinarily a word of purchase it should not be so construed when such a construction is opposed to the intent of the grantor.

McGinnis v. Banta, 11 Ky. Opin. 721.

§ 124. Fee simple.

A deed from a vendor, who had held land in controversy through undisturbed adverse claim for a period of forty years is held to be a sufficient compliance with a contract to give "a good and sufficient deed."

Porter v. Cummins, 2 Ky. Opin. 657.

A conveyance of real estate by a mother to her daughter "for and in consideration of the love and affection that I bear my daughter, the said Lydia B. Blincoe, and also for her and her children's better maintenance, support and livelihood, . . . to have and to hold the property hereby conveyed to the party of the sec-

ond part, and her heirs and assigns forever," was held to convey an absolute estate in fee simple to the daughter.

Blincoe v. Blincoe, 9 Ky. Opin. 68.

§ 126. Conditional fees.

Where a conveyance is made on condition that, if the grantee dies without issue, alive at his death, the property should go to his brothers and sisters, and he sells and conveys such real estate during his lifetime, the brothers and sisters have no interest in such real estate and can maintain no action for any part of the purchase money thereof.

MaGowan v. Fry, 9 Ky. Opin. 306.

Where a deed conveys a fee simple title, subject only to be divested should the grantee die without issue, and providing that in that event the property should go to his brothers and sisters, such condition does not reduce the estate to a mere life estate with remainder over, but such grantee takes a fee simple subject only to be defeated if he dies without issue, and if he conveys such real estate his grantee takes a fee simple subject to the same conditions.

MaGowan v. Fry, 9 Ky. Opin. 306.

Where a father about to marry for the second time makes a deed to his children conveying three hundred and twelve acres, but as to seventy acres not included in the three hundred and twelve speaks thus in the deed: "This piece I still hold and all the buildings thereupon; at my decease if any of these heirs (his then) my five children, want this piece they shall have it at the price now set by me, or all of them can have all the same chance at the above piece at this price: I value this myself at \$700," it is held in a contest, between said five children and other children by his second marriage, that the deed was a conditional conveyance of the seventy acres, to take effect upon a condition—namely, that they, the five children or any of them, should take it by paying to his estate \$700.

Enoch v. Enoch, 13 Ky. Opin. 802.

A husband conveyed his real estate to his wife for life with remainder to his grandson for consideration of love and affection, "provided (to use the language of the deed) said May Chaney (his wife) continued to live with said first party, as his wife during his lifetime," it was held, where she refused to live with him, but violated her marital vow and married another, that the grantor might have the deed canceled as to her, but not as to his grandson.

Chaney v. Chaney, 13 Ky. Opin. 980.

§ 128. Application of rule in Shelley's case.

The rule in Shelley's case has never prevailed in this state.

Allen v. Terrell, 10 Ky. Opin. 786.

Words of inheritance are not required to be used in a deed or will in order to pass a fee, whether absolute or conditional.

Cleveland v. Cleveland, 12 Ky. Opin. 181.

§ 129. Life estates.

Where a husband makes provision for his wife and children, he should be presumed to do so with the intention to give the whole to the wife for life, remainder to the children, unless a contrary intention is shown from the terms of the provision or from the facts and circumstances attending it.

Davis v. Hardin, 10 Ky. Opin. 674.

§ 130. Reversions.

The failure of the vendees in a deed to provide sufficient maintenance for their relations, as a condition precedent stipulated in the deed, and their removal to another state and remaining away for several years, is sufficient to entitle the grantors to a reversion of the title to them.

Whaley v. Whaley, 2 Ky. Opin. 374.

Where a husband owning real estate conveys it to another who takes it as the husband's trustee for the purpose of conveying it to the wife, and the deeds to the trustee and by the trustee are made at the same time, they must be construed together, and when the wife is not present and the

husband has the trustee to insert in the deed made to the wife a clause that if the wife should die without having disposed of said property, it should return to him, and the wife dies the owner of such property prior to the death of her husband, the real estate will revert to the husband.

Fisher v. Ryan, 13 Ky. Opin. 431.

§ 133.—Vested or contingent.

Where a wife conveyed her land to B for the stated consideration of \$2,000, and B for the same recited consideration conveyed the land to the wife's husband for life, with remainder to her son and daughter, with the condition that if said son and daughter should die without heirs prior to the death of their father, then the estate should go to P's, the wife's children by her former husband, the estate did not pass to P's, the daughter of the wife by the second husband having died leaving her father as her heir, and the father having died leaving his son as heir.

Morris v. Payne, 7 Ky. Opin. 666.

§ 134. Conditional limitations.

Where a deed to church property provides that it shall revert to the grantor or his heirs in case any of the conditions therein specified should be violated, where one of the conditions is that the church shall "forever remain free to all persons, and most especially to the poor, to worship God," and on petition of the church it is ordered sold by the court to pay debts, the grantor, if not a party to the suit to sell, can recover the property from the purchaser at such sale; but when he is a party to the suit and assents to the sale he is bound by it, and can not so recover it.

The Union Bethel Church of Newport v. Gaylord, 10 Ky. Opin. 838.

§ 136. Joint tenancy or tenancy in common.

Where a conveyance was made to a widow as the wife of the deceased husband, it was held that she took as an ordinary grantee, and not as a widow, and can claim under the deed

only as joint tenant with her children.

Bidwell v. Rowe, 6 Ky. Opin. 368.

(D) EXCEPTIONS AND RESERVATIONS.

§ 137. Nature and creation of exceptions.

Where a contract for the sale of land reserves to the vendors the coal, oil and mining privileges, but the deed executed does not contain such reservation, the deed should be canceled and a new deed executed containing the proper reservation.

Heath v. Davis, 6 Ky. Opin. 429.

§ 140. Construction and operation of exceptions.

A deed which contains an exception of "all such parts and parcels of the first described tract of land as are now in the possession of any person or persons and held under any title or claim of title adversely to the party hereto of the first part," and "contains after such exceptions 24,000 acres more or less," is held not to embrace any lands claimed by said conveyance which had been held by any one for the statutory period giving title by adverse possession.

Blanchet v. Musselman, 1 Ky. Opin. 569.

§ 152. Construction and operation of conditions.

Where a deed contains the provision that no sale of the land shall be made without the consent of the grantor, it is notice to the world of the reservations and conditions therein made.

Cummins v. Whaley's Admr., 5 Ky. Opin. 246.

(E) CONDITIONS AND RESTRICTIONS.

§ 146. Validity of conditions.

§ 147.—In general.

Where in a deed from a husband and father to his wife and children, the grantor reserves the power to sell, he conveys the title subject to such power.

Thomas v. Moody, 10 Ky. Opin. 667.

(F) LOSS OR RELINQUISHMENT OF RIGHTS.**§ 178. Rescission by parties in general.**

A rescission can only be asked for in an equitable action, and not in a suit at law for damages.

Fennessey v. Abbott, 4 Ky. Opin. 469.

IV. PLEADING AND EVIDENCE.**§ 184. Pleading.**

A demurrer to a petition to set aside a deed to land and subject the land to the payment of plaintiff's debts, was held properly overruled.

Briggs v. Cain, 6 Ky. Opin. 73.

An answer affirmatively alleging an offer to sell property, as charged in the petition, which was accepted "provided Parker and wife would make a good deed," is not equivalent to a denial of the allegations that the grantors made the deed variant from the contract by mistake.

Shepherd v. Parker, 3 Ky. Opin. 143.

§ 185.—In general.

It is not enough to allege in a petition to set aside a conveyance that the consideration for such conveyance was love and affection, and that the grantor was indebted at the time, but the amount and manner of indebtedness and to whom, and that it was unpaid when the petition was filed, must be alleged.

March v. March's Assignee, 10 Ky. Opin. 601.

§ 191. Presumptions and burden of proof.**§ 194.—Delivery.**

From the palpable unreasonableness of appellant's conveyance without consideration, whereby he left himself homeless, it will be inferred that he did not understand the legal effect of the conveyance, and did not know the essential difference between a will and a deed.

Pinkston v. Pinkston, 1 Ky. Opin. 98.

§ 198. Admissibility of evidence.

It is error to admit as evidence

certificates of officers of a foreign state, to establish the existence of an unrecorded deed.

Goodman v. Bolton, Vass & Land, 3 Ky. Opin. 135.

The recitals in a deed, although evidence as between the parties thereto, are not evidence as against those who are not parties or privies.

Tuck v. Ogburn, 5 Ky. Opin. 326.

A deed is admissible in evidence, even though it was not lodged for record, and not recorded until twenty years after being acknowledged, since it is operative from the date of record without reference to the date of acknowledgment.

Board v. Moorman, 10 Ky. Opin. 562.

Recitals in a deed are not evidence for or against those who are not parties to it.

Grief v. McCracken County, 10 Ky. Opin. 565.

The truth of a recital in a conveyance may be controverted by parol proof, such a recital being competent between the parties to the instrument, but incompetent against strangers.

Lankey's Admr. v. McElroy, 11 Ky. Opin. 102.

§ 199.—Execution, existence, and identity.

In the absence of any allegation or proof that one is mistaken as to what land was intended to be conveyed by a deed which that one drew himself, the deed in itself is sufficient proof of the contract between the vendor and vendee.

Lindsey v. Whittle, 12 Ky. Opin. 265.

§ 202.—Consideration.

It may always be proved by parol what the real consideration in a deed is, and that it is different from that expressed in the deed.

Burke v. Burke, 13 Ky. Opin. 834.

A written contract, in the absence of an averment that a part of it has been omitted by mistake or fraud, is the highest evidence of the agreement between the parties to it, but parol evidence may be introduced to

show a different consideration from the one recited in it.

Cincinnati Southern R. Co. v. Hogan, 13 Ky. Opin. 1096.

§ 205. Weight and sufficiency of evidence.

The detail of conversations alleged to have occurred nearly thirty years prior to the examination of the witnesses can have but little weight in an attempt to destroy the plain and unmistakable language of a deed.

Moore v. Cleveland's Admr., 6 Ky. Opin. 588.

§ 207.—Execution, existence, and identity.

When the evidence preponderates in favor of the grantor's capacity, and there is no implication of fraud or improper influence, and the court having so adjudged, the purchaser will be secure against any probable impeachment of the deed thereafter.

Field v. Young, 2 Ky. Opin. 90.

DE FACTO OFFICER.

Validity of acts, see Officers, § 92.

DEFAULT.

Judgment by, see Judgment, IV.

Setting aside judgment by default, see Judgment, § 138.

DEFECTS.

In petition cured by answer, see Pleading, § 403.

In pleading cured by exhibit, see Pleading, § 400.

In pleading cured by other pleading, see Pleading, § 401.

DEFENDANTS.

See Parties, II.

DEFENSE.

See Account, I; Attachment, §§ 345, 355; Fraud, § 48; Malicious Prosecution, § 53; Pleading, III, A; Trespass, § 22.

Abandonment of, see Pleading, § 339.
Acting under authority of another, see Criminal Law, § 58.

Action by president of corporation, see Corporations, § 354.

Action for assault, see Assault and Battery, § 8.

Action for breach of marriage promise, see Breach of Marriage Promise, § 13.

Action for divorce, see Divorce, III.

Action for slander, see Libel and Slander, § 71.

Action on bail bond, see Bail, § 28.

Action on foreign judgment, see Judgment, § 930.

Action on improvement contract, see Municipal Corporations, § 546.

Action on insurance policy, see Insurance, § 614.

Against assignee, see Bills and Notes, § 314.

Breach of revenue law, see Contracts, § 338.

By sureties, see Principal and Surety, § 141.

Defects of title, see Vendor and Purchaser, § 308.

Denial under oath, see Pleading, § 155.

Election as to, see Pleading, § 369.

Fraud as defense, see Fraud, § 36.

In action by assignee of note, see Bills and Notes, §§ 450, 452.

In action for conversion, see Trover and Conversion, § 21.

In action for purchase-money, see Vendor and Purchaser, § 340.

In action of ejectment, see Ejectment, § 22.

In action on lease, see Landlord and Tenant, § 222.

Inconsistent defense, see Pleading, § 93.

In foreclosure proceedings, see Mortgages, § 415.

Insanity as defense, see Criminal Law, § 48; Homicide, § 294.

Instructions as to, see Homicide, § 109.

License, see Licenses, § 43.

Non est factum, see Bills and Notes, § 450.

Of bankruptcy, see Bankruptcy, § 435.

Of coverture, see Husband and Wife, § 217.

Of infancy, see Infants, § 93.

Parol contract in statute of frauds, see Frauds, Statute of, § 147.

Personal defense, see Pleading, § 84.

Pleading and proof of, see Action, § 12.

Pleading discharge in bankruptcy, see Bankruptcy, § 433.

Pleading inconsistent defenses, see Pleading, § 93.

Prosecution for illegal sale of intoxicating liquors, see Intoxicating Liquors, § 235.

Statute of limitations, see Limitation of Actions, § 181.

That same act had been committed in another state, see Criminal Law, § 31.

Title by adverse possession, see Ejectment, § 24.

To action against guardian, see Guardian and Ward, § 121.

To action on bond of deputy sheriff as revenue collector, see Sheriffs and Constables, § 130.

To action on note, see Bills and Notes, § 450.

Waiver of, see Bills and Notes, § 98.

DEFENSE OF ANOTHER.

See Homicide, §§ 97, 122, 196.

Instruction as to, see Homicide, § 301.

DEFICIENCY.

In land sold, see Vendor and Purchaser, § 165.

DEGREES.

Of crime, see Criminal Law, §§ 28, 63.

Of homicide, see Homicide, §§ 21, 306.

Reasonable doubt as to degree of offense, see Criminal Law, § 28.

DELIVERY.

See Bills and Notes, I, C.

Effect of, see Sales, § 169.

Essential to gift, see Gifts, § 17.

Note signed on Sunday but delivered on secular day, see Bills and Notes, § 62.

Of attached property, see Attachment, § 191.

Of deed, see Deeds, I, D.

Of written contract, see Contracts, § 42.

Place of, see Sales, § 79.

What constitutes, see Sales, §§ 155, 171.

DEMAND.

By claimant against deceased's estate, see Executors and Administrators, § 222.

For subscription to stock not necessary, see Corporations, § 78.

Prerequisite to suit, see Action, § 11.

When necessary, see Municipal Corporations, § 183.

DEMURRER.

See Pleading, V.

Facts admitted by, see Pleading, § 214.

Presumption of overruling, see Appeal, § 500.

Searches record, see Pleading, § 217.

To indictment, see Indictment and Information, §§ 58, 145, 147.

To petition to quiet title, see Quieting Title, § 41.

When presumed to have been overruled, see Appeal, § 915.

DE NOVO.

Trial of appeal from county court to circuit court in condemnation proceedings, see Eminent Domain, § 261.

Trial on appeal from justices of the peace, see Justices of the Peace, § 170.

DEPOSITARIES.

See Escrows, § 3.

DEPOSITIONS.

§ 17. Persons whose depositions may be taken.

§ 48. Officer or persons authorized to take.

§ 55. Time of taking.

§ 56. Notice of taking.

§ 61. Presence of parties or counsel.

§ 72. Making and requisites of return or certificates.

§ 81. Amendment and correction.

§ 83. Suppression.

§ 84. Retaking.

§ 87. Admissibility in evidence.

§ 90.—Deponent present or within reach of process.

§ 91.—Incompetency of deponent.

§ 92.—Irregularities in taking or return.

§ 97. Actions and proceedings in which deposition may be used.

§ 99.—Other actions between same parties.

§ 102. Defects and objections.

§ 105.—Time for objection in general.

Exceptions to ruling on deposition, see Appeal, § 260.

Presumption as to residence of deponent, see Appeal, § 926.

§ 17. Persons whose depositions may be taken.

The fact that one party demands the personal attendance of a witness does not prevent the other from taking the deposition of such witness, and reading it on the trial of the cause, provided the party demanding the presence of the witness goes to trial without it.

Johnson v. Mullen's Assignee, 5 Ky. Opin. 561.

§ 48. Officer or persons authorized to take.

Where a commissioner takes a deposition, styling himself such, it will be presumed that he was appointed.

Green v. Stevens, 1 Ky. Opin. 36.

§ 55. Time of taking.

In taking a deposition in term time, a party can not complain of the action of his opponent in taking a deposition, where his opponent simply followed his example and exercised a right which the other party had first assumed.

French v. French, 6 Ky. Opin. 739.

§ 56. Notice of taking.

Where a plaintiff does not reside in the county, a notice to his attorney of the time and place of taking depositions is sufficient, whether the attorney resided in the county or not.

Burchett v. Biggs, 9 Ky. Opin. 22.

Where both parties reside in the same city, and a notice to take a deposition at a designated place in the city on the 11th day of March, between 2 o'clock p. m. and 5 o'clock

p. m., "and if not then taken could be taken on the next day between 9 o'clock a. m. and 5 o'clock p. m.," and the notice is dated March 11th and not served until 10 o'clock a. m. on March 12th, the notice is unreasonable as to time and the party upon which it was served had the right to presume that the deposition had been taken when the notice was served.

Brown's Admr. v. L. C. & I. R. R. Co., 13 Ky. Opin. 442.

A notice to take depositions should be served long enough before the taking as to afford to a party a reasonable opportunity to be present, and he should be allowed a reasonable time to notify or find his attorney.

Greer v. Ludlow, 13 Ky. Opin. 647.

§ 61. Presence of parties or counsel.

Where depositions were taken by a party in the absence of his opponent, and the latter excepts to the depositions, and allowed two vacations to pass without asking leave to cross-examine the witnesses, there is no ground of complaint because of the overruling of his exceptions.

French v. French, 6 Ky. Opin. 739.

§ 72. Making and requisites of return or certificates.

The failure of an examiner to state that the depositions of the witnesses were subscribed by them in his presence is error, authorizing a reversal.

Sharp's Admr. v. Warper, 4 Ky. Opin. 516.

The certificate to a deposition, to be sufficient, should show that testimony reduced to writing by the examiner was read to the witness before being signed by him.

Greer v. Ludlow, 13 Ky. Opin. 647.

§ 81. Amendment and correction.

On a conflicting deposition given by a witness, in two different trials, it is within the power of the jury to conclude that witness was mistaken in one.

Mills v. Cole, 4 Ky. Opin. 405.

§ 83. Suppression.

Where a motion was made to suppress a deposition, and in support of same an affidavit was made by the

attorney that he was present when the deposition was given; that on the conclusion of examination for appellee, the witness refused to be cross-examined, and was encouraged in this refusal by counsel for appellees; in the absence of any conflicting proof as to the taking of the deposition, it was error for the court to refuse the affidavit to be read as evidence, and not to suppress the deposition.

West v. Dowling, 4 Ky. Opin. 414.

An affidavit by defendant in action for work, labor and material done and furnished on defendant's house, that defendant knew nothing of the taking of a certain deposition which was read in evidence is simply an affidavit against the officer's oath who took the deposition, with the intrinsic probabilities in favor of the officer; and as the deposition had probably been on file for months it was great laches in defendant not to have known of it.

Shreve v. Cross, 3 Ky. Opin. 204.

§ 84. Retaking.

Where a right to retake depositions is granted, the former having been suppressed on the ground of having been taken before the time allowed by law, and exceptions were sustained thereto, it is a mere irregularity, which was cured by the retaking of the depositions.

Waller v. Johnson, 4 Ky. Opin. 308.

§ 87. Admissibility in evidence.

Where depositions in another suit were offered as evidence, in which "Burns M. Walker" as a defendant testified, and was sought to be used in this suit wherein "B. M. Walker" was a plaintiff, to prove his contradicting statements, the presumption of identity arising from the coincidence of names, in the absence of any evidence to repel it, was prima facie sufficient as a slight evidence of identity.

Ray v. Walker, 4 Ky. Opin. 151.

Depositions used in a former adjudication of a case before the appellate court and not then excepted to are properly admitted on the return of the cause, as evidence in the second trial, the question of its competency

being settled by the former adjudication.

Hopper v. Holtzclau, 2 Ky. Opin. 665.

Where a notice to take depositions was in the name of G., appellee, and in the caption it is stated that they were to be used in the case of G., assignee of S., it is not sufficient to authorize the court to exclude the depositions.

Noland v. Shepherd, 2 Ky. Opin. 154.

§ 90.—Deponent present or within reach of process.

Even if a deposition is in itself competent evidence, it will not be permitted to be read when the person giving it is present in court and did actually testify as a witness.

Beall v. Bethel's Admr., 11 Ky. Opin. 567.

§ 91.—Incompetency of deponent.

Under the provisions of Buckner & Bullitt's Civ. Code (1876), § 606, subsec. 4, no person may testify for himself in chief after taking other testimony in chief, and where the appellee, before she gave her deposition, had taken that of another in chief, the withdrawal of said first deposition will not render her own deposition admissible.

Allison v. Moore, 11 Ky. Opin. 253.

§ 92.—Irregularities in taking or return.

A deposition is not admissible as evidence where no notice is given to the adversary of the time and place, when and where it was taken, and where no opportunity was given him to cross-examine the witness.

Ogden v. Ogden, 10 Ky. Opin. 578.

§ 97. Actions and proceedings in which deposition may be used.

Depositions in another suit may be used as evidence that one of the parties in that suit was attempting to establish the facts that had been denied in the suit then in litigation.

McElroy v. Dunn, 3 Ky. Opin. 146.

Where depositions used in another suit are introduced in evidence in an-

other case to show that one of the parties in a former suit was attempting to establish facts denied in the subsequent suit, it will be presumed that such facts in reality exist.

McElroy v. Dunn, 3 Ky. Opin. 146.

The deposition of a witness, though suppressed on exceptions, may be used by the adverse party to contradict any sworn statement he may make in the cause during its progress.

King v. Boles, 4 Ky. Opin. 147.

§ 99.—Other actions between same parties.

It is error to allow the deposition of the witness, taken in another cause, to be read in evidence, although the deposition was referred to by the witness and made a part of his deposition in the pending cause, where it related to a different transaction and was calculated to confuse and mislead the jury.

O'Daniel v. Flannigan, 6 Ky. Opin. 297.

The deposition of a deceased witness which was used on the former trial may be used in the subsequent trial involving the same issues.

Cooper v. Cooper's Admr., 7 Ky. Opin. 84.

Depositions taken by one party in a former cause between the same parties, in which title to the same land was involved may be read in evidence by the other party.

Jenkins v. Goodaker, 8 Ky. Opin. 252.

§ 102. Defects and objections.

Exceptions to depositions must be noted and filed before the commencement of the trial.

Higgins v. Kittrell, 4 Ky. Opin. 644.

Exceptions made before the examiner will not be considered, except so far as it may affect the competency of the witness, and such exceptions may be made by motion at the trial.

Higgins v. Kittrell, 4 Ky. Opin. 644.

Where no exceptions are taken to the ruling of the court in rejecting the deposition of a witness, even

though the court erred, the error must be deemed waived.

Bowen & Son v. Martin, 1 Ky. Opin. 42.

The appellant having failed to except at the time to the decision of the court sustaining exceptions to the deposition, must be taken to have waived the objection.

Watts v. Whittington's Exrs, 1 Ky. Opin. 6.

It not appearing that the exceptions of either party to the depositions were acted on in the court below, therefore they must be regarded as unread.

Rantt v. Hardin, 2 Ky. Opin. 69.

Exceptions to depositions made in the trial court, and which are not disposed of by the chancellor, are presumed to have been waived.

Levy v. Ullman & Co., 2 Ky. Opin. 208.

If the depositions were not taken at the place designated in the notice, but the adjournment from that place was authorized by the code, and defendant was present, he can not avail himself of such irregularity.

Rantt v. Hardin, 2 Ky. Opin. 69.

After exceptions to depositions have been sustained, the depositions withdrawn, and then by agreement of the parties, the plaintiff is permitted to read the depositions upon the trial of the cause, the objections are thereby waived, and can not be available for reversal in the court of appeals.

Allen v. Upton, 2 Ky. Opin. 571.

§ 105.—Time for objection in general.

It is too late to object to the reading of a deposition when not made until after the trial commenced.

Ditzler v. Smithers, 10 Ky. Opin. 523.

DEPOSITS.

See Banks and Banking, III, C.

Certificate of deposit, see Banks and Banking, § 152.

In lieu of bail, see Bail, § 73.

Title to, see Banks and Banking, § 128.

When do not constitute payment, see Payment, § 3.

DEPUTIES.

See Sheriffs and Constables, I. C.

DESCENT AND DISTRIBUTION.**I. NATURE AND COURSE IN GENERAL.**

- § 9. Rule of descent dependent on whether property is personality or realty.
- § 10. Source of title and seisin of intestate.
- § 17. Descent of remainders, reversions, and executory devises.

II. PERSONS ENTITLED AND THEIR RESPECTIVE SHARES.**(A) HEIRS AND NEXT OF KIN.**

- § 20. Kindred in general.
- § 25. Descendants.
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- § 32. Brothers and sisters and their descendants.
- § 36. Grand parents and remote ascendants.
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- § 39.—Division between paternal and maternal kindred.
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(B) SURVIVING HUSBAND OR WIFE.

- § 52. Nature of right in general.
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III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.**(A) NATURE AND ESTABLISHMENT OF RIGHTS IN GENERAL.**

- § 73. Title of heirs or distributees.
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§ 91.—Relating to personal property.

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(B) ADVANCEMENTS.

- § 93. Nature and essentials in general.
- § 95. Property subject of advancement.
- § 98. Intent to make advancement.
- § 104. Operation and effect of advancements in general.
- § 105. Persons chargeable with or taking subject to advancements.
- § 108. Bringing property into hotchpot for distribution.
- § 109.—In general.
- § 112. Valuation.

(C) DEBTS OF INTESTATE AND INCUMBRANCES ON PROPERTY.

- § 119. Nature and grounds of liability of heirs and distributees.
- § 122. Liabilities on receipt of personal property or distributive share.
- § 124.—Extent of liability.
- § 125. Liability on descent of real property.
- § 126.—Debts enforceable against heirs in general.
- § 130. Liens for debts as against heirs.
- § 137. Actions against heirs, distributees or purchasers.
- § 141.—Defenses.
- § 144. Parties.
- § 147.—Evidence.
- § 152. Contribution.

(D) RIGHTS AND REMEDIES OF CREDITORS OR HEIRS AND DISTRIBUTEES.

- § 153. Right to subject interests in estate in general.
- § 154. Interest or rights which may be subjected.
- § 157. Actions and other proceedings by creditors.

See Executors and Administrators, VII.

Distribution of proceeds by trustee, see Trusts, § 282.

Inheritance by children of customary slave marriages, see Slaves, § 14.

I. NATURE AND COURSE IN GENERAL.

§ 9. Rule of descent dependent on whether property is personalty or realty.

The capital stock in a railroad corporation is realty and descends to the heirs at law of the original owner, and they are entitled to hold same and enjoy the profits, in the way of dividends, arising from such estate as against the personal representatives.

Maroman's Admr. v. Bunting, 5 Ky. Opin. 599.

§ 10. Source of title and seisin of intestate.

The devise was a vested remainder upon the testator's death, hence all the surviving children of the testator, at his death, took an immediate vested interest which descended by operation of law to their heirs.

Coomes v. Coomes' Devisees, 1 Ky. Opin. 406.

§ 17. Descent of remainders, reversions, and executory devises.

Where a testator bequeaths a life estate to his widow, but does not dispose of the fee of his real estate, but places the property in the hands of an executor to manage and sell at the death of his widow and divide the money among his children, such fee descends at his death to his heirs.

Vandergrift v. Cox, 8 Ky. Opin. 334.

II. PERSONS ENTITLED AND THEIR RESPECTIVE SHARES.

(A) HEIRS AND NEXT OF KIN.

§ 20. Kindred in general.

The word "heirs," or the words "legal heirs," when used with reference to personal estate, are generally construed as meaning distributees, or all those who under the law take the personal estate as the next of kin, or by reason of their relation to the deceased.

Erol's Admr. v. Roel, 9 Ky. Opin. 739.

Real estate owned by an infant dying without issue descends to the parent from whom such estate is derived, either by descent, demise or gift; and

in case such parent be dead the infant's real estate will descend to his or her kindred, provided the kindred are not more remote than grandparents, uncles or aunts.

Vice v. Vice, 11 Ky. Opin. 319.

§ 25. Descendants.

§ 26.—Children in general.

The evidence was held to show that the party in possession of land of the decedent was his daughter and that she was entitled to share in the distribution of the estate.

Morris v. Smith, 7 Ky. Opin. 735.

Under 1, M. & B. Stat., § 565, and R. Stat., ch. 47, § 2, subd. 3, legitimizing the issue of void marriages, the daughter of a void marriage is capable of inheriting from her father.

Jones v. Jones, 6 Ky. Opin. 261.

Children born in wedlock, entered into according to the custom among negroes, are legitimate and capable of inheriting.

Brown v. Mundy's Admx., 11 Ky. Opin. 270.

§ 30. Parents.

Where an infant dies, having derived title to real estate, by descent from its father, the mother acquired no right or title to such land, but the same passes by descent to the next of kin on the father's side, however the widow has her dower therein.

Thomas v. Miller, 5 Ky. Opin. 349.

Where a will provides: "I give and bequeath, in trust, to Thomas D. Kennedy and George M. Southgate one-sixth part of said real estate for the use and benefit of the children of William W. Southgate, my deceased son, to be equally divided between them, subject to the following restriction: that said trustees will hold one-tenth of said real estate for Adeliza Arthur for life, remainder to her children. Should any of the children of William W. Southgate die without issue and unmarried, their part to go to the remaining brothers and sisters," and at the publication of the will, and at the testator's death W. W. Southgate's daughter, Mrs. Arthur, had married the appellee with reasonable prospect of issue, and not long afterward gave birth to a son,

whom she survived, and after her own death her surviving husband, the appellee, as heir of his infant son, claiming the tenth part of the testator's estate, proceeded to assert his right by suit, the remainder was vested on the birth of the son free from any contingency of defeasance, and, therefore, the father, as heir to the son, is entitled to the estate as claimed.

Kennedy v. Arthur, 3 Ky. Opin. 466.

Where a wife inherits real estate from her father, and in a partition suit it is ordered sold and is purchased by the wife and others interested as heirs, but conveyance is afterward made to the husband, the wife owns it; and it is immaterial whether there is any evidence of a promise on the part of the husband to convey or have conveyed to his wife, since it was in effect, allotted to her in the division of her father's estate, and to the extent of her interest, the title stands as if there had been no conveyance to the husband.

Delaney's Admr. v. Delaney, 11 Ky. Opin. 62.

§ 32. Brothers and sisters and their descendants.

Where only the personal use of land and personalty are devised for life; upon the death of the devisee without issue the estate descends to his surviving brothers and sisters.

Boone v. Robinson's Admr., 1 Ky. Opin. 464.

Where an intestate dies without children, leaving no father or mother surviving, her estate passes to her brothers and sisters, and the fact that they were only of the half blood can make no difference.

Nunnally v. Nunnally's Admr., 12 Ky. Opin. 295.

§ 36. Grandparents and remote ascendants.

Where a person dies intestate, not leaving surviving him a father, mother, brothers or sisters or their descendants, and the property came to him by inheritance from his mother, his property will descend to his maternal grandfather and grandmother equally if both are living and to the

survivor if either is dead, and if both are dead to their descendants.

Berkely v. Stewart, 12 Ky. Opin. 446.

§ 37. Remote collaterals.

§ 39.—Division between paternal and maternal kindred.

Where land is derived by descent from the mother, the real property of an infant, by the law of descent, passes to the next of kin on the mother's side.

Cosby v. Fenlock, 8 Ky. Opin. 135.

§ 41. Half-blood.

Children of the half-blood will inherit one-half as much as children of the whole blood.

Brown v. Mundy's Admx., 11 Ky. Opin. 270.

Where the owner of real estate dies intestate leaving children by a former marriage and a wife and one child by his last marriage, and the last named child dies in infancy, not leaving issue, the real estate of said child will descend to its father's children by his first wife to the exclusion of its mother.

Vice v. Vice, 11 Ky. Opin. 319.

§ 44. Operation and effect of will.

Where under the provisions of a will, if the wife should survive her issue, and the husband should survive her, she not having died unmarried, and the devise could not take effect, the estate would pass by the law of descent and distribution.

Kennedy v. Arthur, 3 Ky. Opin. 466.

(B) SURVIVING HUSBAND OR WIFE.

§ 52. Nature of right in general.

The timber on land which passes to the wife on the death of the husband belongs to the wife.

Chandet v. Gordon, 6 Ky. Opin. 451.

Where a decedent left surviving him children by a former marriage, also a widow and children by her, and during the life of the widow certain personal property was set off to her as exempt, and the widow then

died, the children of her body alone were entitled to such property.

Manzey v. Girvin, 8 Ky. Opin. 370.

Where the wife has a separate estate in land at her death, the husband will inherit, unless there is something in the antenuptial contract to prevent.

Brightwell v. Brightwell's Admr., 9 Ky. Opin. 633.

Where the grantor has a lien against real estate of the husband, after the death of the husband the widow is entitled to the occupancy of the house until the assignment of dower or until its sale; and the lien of the grantor does not extend to the rents, and the widow is entitled to them.

Cass v. Smith, Blair & Co., 12 Ky. Opin. 135.

§ 62. Estoppel, waiver, or release of right.

A court of equity will not indulge claims of a wife for particular property or the proceeds thereof as her inheritance, and at the same time for the interest and annual profits or proceeds of property in the hands of a trustee, which belonged to her husband prior to the conveyance.

Bolling v. Rogers, 1 Ky. Opin. 139.

III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.

(A) NATURE AND ESTABLISHMENT OF RIGHTS IN GENERAL.

§ 73. Title of heirs or distributees.

Heirs occupy the relation of privies to the contract of their father, and can not hold on to the estate received from him and repudiate his warranty by claiming through their mother.

Malone v. Barrell, 6 Ky. Opin. 502.

A county court has no jurisdiction to divide heirs' personal property, which cannot be done in kind.

Riney v. Riney, 1 Ky. Opin. 272.

Where the land allotted to one heir in the division of the estate has been sold to pay ancestor's debt, such heir

is entitled to a contribution from the other heirs pro rata.

Hume v. Connelly, 1 Ky. Opin. 287.

The court will require the distributee or legatee, before receiving his distributive share or legacy, to execute a bond with good security to pay back the amount received by him, if any debts appear against the estate within five years.

Smith's Exr. v. Smith, 1 Ky. Opin. 302.

Where a devise created an estate tail as defined by the common law, and by the eighth section of chapter 80 of the Rev. Stat. estates tail are converted into fee-simple estates, on the death the legatee, the land in controversy descended to her heir.

Gorman v. Ray, 1 Ky. Opin. 88.

One of co-heirs who makes voluntary trips to try to purchase the interest of the others, cannot claim such expenses paid as a debt against the estate, in a subsequent action by the other heirs against him, and counsel fees will not be allowed him.

Walker v. McFadden, 2 Ky. Opin. 620.

A party having sold, by parol, more land than was embraced in his deed, and there being no memorandum by which his heirs could be charged, the purchase-money having been paid, its value should have been ascertained and the amount deducted from the price of the land to which decedent had title.

Creech v. Smith, 2 Ky. Opin. 132.

A sale of land by father to son, for a consideration, only a small portion of which is ever paid by the son, inures to the benefit of all the heirs less an advancement to him, equal in proportion to what each of the other children may have received.

Bradford, Admr., v. Kirby, 2 Ky. Opin. 587.

Where an executor and the distributees make and agree on a settlement of the estate between them, they will not be allowed to reopen and convert items in said settlement in a suit between said distributees and

the executrix of the testator and former executor.

Scott v. Scott's Exr., 2 Ky. Opin. 639.

Money received from a sale by an heir should be apportioned between the heirs according to their relative and respective rights, the value of the life estate therein ascertained by the established rule for computation, according to the American Life and Annuity Tables.

McGhee v. Ditto, 2 Ky. Opin. 614.

Where a son, while executor of his father's estate surrendered the title bond of the father for a large tract of land, upon which was due \$450.00, and executed his own note therefor, and upon default the land was sold and bought by a third party, the son acquired an equitable lien on the land for his assumed obligation, and held the title for the benefit and use of the heirs, which trust was to descend to the purchaser under him.

Mooney v. Morgan, 3 Ky. Opin. 281.

Whether a devisee holds property under or against a will, the one with a contingent remainder, as no cause of action would accrue until the demise of the devisee, the remainderman or heir would not be barred in his right by limitation, except to run from the death of said devisee.

Campbell v. Campbell, 3 Ky. Opin. 53.

Such legatee can not afterwards cause a sale of the property for a division of the proceeds.

Berry v. Spence, 3 Ky. Opin. 184.

The erection of a building on property held by a legatee, with a reversion to remaindermen, out of funds belonging to the legatee in fee-simple, and without objection, is held to inure to the benefit of the trust.

Berry v. Spence, 3 Ky. Opin. 184.

Though a plaintiff is not allowed to recover property as devisee of a remainder interest, he will not be estopped to set up his right thereafter as an heir to the estate.

Campbell v. Campbell, 3 Ky. Opin. 53.

Where G devised to D a part of his estate, and she died before receiving the entire amount due her, leaving a surviving husband, who, after her death, claimed the balance of the legacy due his wife, against her surviving brothers and sisters, the legacy vested immediately upon the death of the testator, and D's right to it was not postponed until distribution; hence, upon her death it vested in the husband and became a part of his estate.

White v. Grubb's Exr., 3 Ky. Opin. 598.

By the statute in force at the death of the ancestor, his heirs took the absolute title to the land, to be charged with the debts, but they were not liable for interest.

Hampson v. Covington & Lexington R. Co., 4 Ky. Opin. 674.

The right of the widow and heirs in and to the estate of the decedent vested in them, at his death, and no subsequent legislation can divest them of the interest they acquired.

Butler v. Butler, 4 Ky. Opin. 653.

Where the husband during his lifetime purchased a tract of land by title bond and was in possession of it when he died, the widow is not entitled, by paying the balance or all of the purchase-money out of her own means, to procure from the court an order directing conveyance to be made to her; since the children, against their consent, can not be deprived of their rights in that way; however, the widow in a proper proceeding might have a lien decreed in her favor for the purchase-money paid by her.

Johnson v. Johnson, 11 Ky. Opin. 744.

Where by agreement heirs are to own real estate in common, each in proportion to his lien, and the agreement is made a part of the record, it is enforceable, and a conveyance being made to them in satisfaction of the debt and the property sold by a commissioner, the purchase-money will inure to the benefit of all the parties.

McConnel v. Ranbold, 13 Ky. Opin. 527.

§ 75.—Real property and interests therein.

Where heirs inherit real estate, the county court has no power to divest their title to the land and give to them a slave in lieu of it.

Thomasson v. Greer, 9 Ky. Opin. 666.

§ 79. Rents and profits, income, and accumulations.

Rents accruing after the death of a person vest in his heirs or devisees.

Cass v. Smith, Blair & Co., 13 Ky. Opin. 613.

§ 80. Claims of estate against heirs or distributees.

Where a devisee, who desires his debts paid, part of which is due the administrator, it should be done as far as practicable out of the personal assets descending to him out of the estate, and not by an allowance of same of a set-off against the estate.

Moore v. Moore's Admr., 3 Ky. Opin. 277.

§ 81. Mutual rights and liabilities of heirs and distributees.

Where grandsons take by devise, and not as heirs, such part of the devise as is lost to them by reason of defective title of lands must be made up from other undevised assets of the testator before a pro rata contribution can be demanded from the other legatees; and if such assets be insufficient, then a pro rata contribution from the other legatees will be enforced.

Humphries v. Humphries, 3 Ky. Opin. 721.

§ 84. Conveyances of property by heirs or distributees.

Where an heir has transferred his interest in his father's estate to the payment of his debts, such interest, when ascertained and set apart, becomes subject to the payment of the debts.

Bronston & Francis v. R. Perry White et al., 6 Ky. Opin. 732.

§ 86. Assignments of distributive shares.

Where a husband, with the consent of his wife, conveys her inheritance with a covenant of warranty, her heirs who are also heirs of the hus-

band, can not recover the land from the vendee of the husband, such heirs having received a greater estate from their father.

Malone v. Mark, 6 Ky. Opin. 177.

In a suit by heirs against a receiver in which the receiver makes the heirs parties to the cross-petition, the heirs are not liable to the receiver for an overplus received by them, unless they received it from the receiver.

Hones v. Hudson, 6 Ky. Opin. 188.

§ 88. Actions by heirs or distributees.

A distributee, suing for the recovery of property transferred by the deceased under a fraudulent agreement with the defendant, can not occupy a more favorable position in respect to the fraudulent transaction than the deceased himself.

Schur v. Schur, 3 Ky. Opin. 44.

Where there has been a division among heirs of an estate left by the testator, and each party took and enjoyed his pro rata, a subsequent action to set same aside by one of them, with no offer to refund the money received, or beneficial interest derived by virtue of the agreement of division, can not be maintained.

Bridges v. Burne, 4 Ky. Opin. 456.

§ 91.—Relating to personal property.

Heirs can not bring suit immediately upon the death of their ancestor for a claim due him, since such right can be exercised by them only in case there is no administration of the estate.

Higdan v. Beck, 7 Ky. Opin. 126.

§ 92. Actions against heirs or distributees.

Heirs or devisees may be sued by a creditor for any liability of the decedent, and the failure to make a demand is not an available ground for dismissing such an action.

Peay's Admr. v. Winter's Heirs, 5 Ky. Opin. 419.

Though a contract for maintenance be repudiated by other heirs of a devisee, under the statute of frauds it will not operate to destroy the right of recovery therefor as against

the estate, as this would create a prior lien on the property.

Campbell v. Campbell, 3 Ky. Opin. 53.

A deed from a father to son "in consideration of \$1.00 and the natural love and affection," was an advancement, and chargeable to the son upon a settlement of the estate, such a deed being higher and better evidence than mere statements, some contradictory, made subsequent thereto, by the father; and in such case no rents could be chargeable to the son, this being in the nature of a parol gift of land.

Metcalf v. Stubbs, 3 Ky. Opin. 338.

Land descending to the heir may be aliened by the heir, and a bona fide purchaser for value will hold as against the personal representative of the heir or the creditors of the ancestor, and the remedy is by the creditor against the heir for a recovery to the extent of assets received; and he may, by a proceeding in equity, obtain a lien on the property of the decedent in the hands of the heir.

Carter v. Carter's Admr., 11 Ky. Opin. 940.

(B) ADVANCEMENTS.

§93. Nature and essentials in general.

The evidence was held not to show the gift of a slave to one of the testator's children, but merely a loan of the slave to her, and that the slave was improperly charged against her as an advancement.

Graves v. Motherhead, 7 Ky. Opin. 212.

A note, executed by a legatee to his deceased parent, providing "but not to be paid during life of * * * but after his death, to be paid out of the portion of the estate descending or devised to the undersigned," is not an advancement by the father to the son, but a debt due the estate.

Gudgell v. McClure, 3 Ky. Opin. 518.

Where an intestate placed several of his children in the possession of

parcels of his land and gave them some personal property, intending that this property be held and owned by them and to be accounted for in the final disposition of his estate between all of his children, but failed to execute any kind of writing evidencing the advancements in such a way as to pass title to the land, the appellants' refusal to execute deeds in order to perfect the title to the real estate given by parol to some of the children, resulted in annulling these gifts, and the parties in possession must account for the rents, and be credited with the permanent improvements made by them on the property.

Cummins v. Bradford, 5 Ky. Opin. 78.

Although the grandfather of appellant saw proper to charge his granddaughter, as an advancement, with a tract of land which he conveyed to her husband, yet since the conveyance to the husband was unconditional, and there being no agreement on the part of the husband to hold the land for the benefit of his wife, the land can not be charged to her as an advancement.

Johnson v. Leach's Admr., 5 Ky. Opin. 528.

Where a will provides: "All the money or property that is charged by me to each one of my children in a book kept by me for that purpose is to go and be counted as a part of my estate received by them and as a part of a share thereof to which they are entitled under this will as well as that now charged or that I may hereafter charge any of them with," the advancements made to the daughters should be charged to their children, as it is evident that testator did not mean to charge his sons with advancements and except his daughters therefrom, and the term "money or property," as used by the testator, included the rents charged against such of his children as were occupying portions of his lands.

Eaton v. Redman, 5 Ky. Opin. 782.

Money procured by a son from his father held to be a loan and not an

advancement, and that an action therefor was barred by limitation.

Thomas v. Niles, 7 Ky. Opin. 458.

An ancestor can neither charge that as an advancement which in law is not an advancement, nor exempt a descendant from being charged with that which in law is an advancement, except by disposing of his entire estate leaving nothing upon which the court can operate to secure equality among his representatives.

Malone v. Ray's Exr., 10 Ky. Opin. 347.

A father is under no obligations to make advancements to his son, and even his agreement to do so is not enforceable; and where a father of an insolvent son conveys land to his son's wife, such land is not subject to the son's creditors, for the son has no interest in it.

Powell v. Burke's Heirs, 13 Ky. Opin. 579.

§ 95. Property subject of advancement.

In the settlement of the mother's estate, where she died the owner of real estate, the children can not be charged in the distribution of such estate with money claimed to have been advanced to them in the settlement of their father's estate.

Woodward v. Little, 12 Ky. Opin. 162.

Property given by a mother to her daughter, which belonged to the mother's husband, who consented to the gift, can not be held as an advancement from the mother which can be regarded in a suit to settle the mother's estate.

Gavin v. Gaines, 12 Ky. Opin. 267.

§ 98. Intent to make advancement.

In the distribution of a decedent's estate, it is immaterial whether the amount charged against a child was regarded as an advancement or a debt.

Secrest v. Sandford, 5 Ky. Opin. 142.

The fact that the father kept an account of advancements and failed to charge his daughter with this sum of money for property he had let her

husband have, is conclusive that it was not given to the daughter, but sold to the husband, and she should not be made to account for it.

Lane's Heirs v. Shearer, 5 Ky. Opin. 613.

The question of the ancestor's intentions will not control in determining what shall or shall not be deemed advancements, and in the settlement of a considerable estate the chancellor will not adjudge that small sums of moneys, and beds, bedding, etc., given to children at the time of their marriage, are to be regarded as advancements made by the father.

Ross v. Dimmit, 11 Ky. Opin. 525.

Where, to relieve his son, a father pays his debts of about \$2,000, the son conveying to him forty-eight acres of land as indemnity, and the father agrees to convey the land to his son's wife and children upon receiving back his money, and, if the same is not received during his lifetime, that his heirs will so reconvey said land after his death if the son's interest in the father's estate shall amount to said sum, the money so given to the son is an advancement, and the father can not recover the possession of the land, and it is held that the wife and son of the son can not recover the legal title of the land during the grantee's lifetime except upon the payment to him of the money advanced to pay the son's debt.

Green v. Green, 12 Ky. Opin. 243.

§ 104. Operation and effect of advancements in general.

Amounts paid to heirs will be a charge against their individual interest, and not a charge against the whole estate.

Walker v. McFadden, 2 Ky. Opin. 620.

§ 105. Persons chargeable with or taking subject to advancements.

Where in a suit between heirs a judgment by agreement is entered, decreeing that each of the children shall participate equally in an estate, money advanced to one of the heirs by the deceased father can not be

charged against him so as to make his share under the decree less than that received by each of the heirs.

Newman v. Newman, 11 Ky. Opin. 413.

§ 108. Bringing property into hotchpot for distribution.

§ 109.—In general.

A memorandum book kept by an intestate as to advancements is competent evidence.

Ray v. Hay's Admr., 2 Ky. Opin. 131.

One who takes by way of an advancement can not be made to surrender any of the property so acquired for the purpose of equalization.

Enoch v. Enoch, 13 Ky. Opin. 802.

§ 112. Valuation.

An advancement, in the nature of a parol gift, for the erection of a dwelling is not chargeable with interest, it not being in the class of cases where the use of land is the advancement and not the thing itself, in which case the value of the use, but not the interest thereon, is charged to the beneficiary.

Metcalf v. Stubbs, 3 Ky. Opin. 338.

The valuations fixed by devisees on property given them by the testator will not control the chancellor as to such values; nor is the claim of the testator that he has made them all equal, or given one more than the other, conclusive of that fact.

Talbott v. Clarkson, 10 Ky. Opin. 668.

(C) DEBTS OF INTESTATE AND INCUMBRANCES ON PROPERTY.

§ 119. Nature and grounds of liability of heirs and distributees.

An heir can not be sued by a creditor of the estate until the heir has received assets of the estate, and is only liable to the extent to which he has received assets of the estate.

Evans v. Hall & Lewis, 7 Ky. Opin. 481.

§ 122. Liabilities on receipt of personal property or distributive share.

§ 124.—Extent of liability.

An heir is not liable on his ancestor's contract beyond the extent of assets received by him from the ancestor's estate.

Rowan v. Russell, 10 Ky. Opin. 721.

§ 125. Liability on descent of real property.

The defendants are liable, either as heirs, distributees or trustees to pay the debt of their father, they having received from him a sufficiency to satisfy it.

Ingrain v. Plummer's Exr., 2 Ky. Opin. 262.

In a suit for restitution by some of the heirs against a son, for distribution of property placed in his hands by his father, each of the heirs is held entitled to an advancement equal to the largest amount made any one of them during the life of the parent, to be first paid to them out of the whole estate.

Bradford, Admr., v. Kirby, 2 Ky. Opin. 587.

§ 126.—Debts enforceable against heirs in general.

Where heirs receive anything from an estate as distributees, they are to that extent bound personally to pay decedent's debts, and such heirs may be sued for the debts of their ancestor.

Harmon v. Higgins, 8 Ky. Opin. 259.

An heir receiving property from his ancestor may be sued in equity by a creditor for any liability of the ancestor.

Duncan v. Gaines, 9 Ky. Opin. 839.

§ 130. Liens for debts as against heirs.

While heirs, by reason of assets received, may be liable for the debts of the ancestor to the extent of property received, the creditor has no lien on such property, but the remedy must be by execution on judgment procured.

Abell v. Abell, 11 Ky. Opin. 128.

§ 137. Actions against heirs, distributees or purchasers.

Where, in a petition, presumptive heirs are made known to the court, it is error to require the plaintiff to proceed against other unknown heirs.

Treadway v. Walden, 3 Ky. Opin. 149.

The allegations that his vendor was an heir of her deceased brothers and sisters, and that he is entitled to her inheritance, is sufficient, and a dismissal of the petition without prejudice is erroneous.

Treadway v. Walden, 3 Ky. Opin. 149.

§ 141.—Defenses.

Where an advancement is pleaded as a defense to a suit on a written instrument, the fact of its being an advancement is inconsistent with and contradicts the writing sued on, both in its import and legal effect, and fraud or mistake should be alleged and established before such defense could be available.

McCown's Admr. v. Jennings, 11 Ky. Opin. 123.

§ 144.—Parties.

Under § 2, Act August 23, 1862 (Myer's Supp., § 420), the fact that the person having the present interest in the land sought to be sold was not a party plaintiff, but defendant, does not invalidate the proceeding.

McDowell v. Butler, 6 Ky. Opin. 201.

§ 147.—Evidence.

In actions against heirs, devisees, or fraudulent grantees, the debt against the devisor or grantor must be established by original evidence against the party holding the property, independent of any proceeding against the personal representative of the debtor.

Adams v. Conner, 7 Ky. Opin. 314.

§ 152. Contribution.

Creditors can not reach and dispose of the interests of devisees by a judicial proceeding to which such devisees were not parties.

Lunsford v. Stamper, 8 Ky. Opin. 538.

Where a testator gave land to his widow for life with a fee to his four children, and before the partition of the land the widow and three of the children conveyed certain portions of the land to the husband of the other child, evidently intending the conveyance for the benefit of the grantee's wife as one of the owners, and the husband of such child conveys three and one-half acres thereof to a college which placed valuable improvements thereon, and several years thereafter and after the death of the husband, in a partition between the heirs of the ancestor, such child accepts said three and one-half acres as a portion of the real estate, she knowing that her husband had conveyed the same and that his grantees were claiming to own it and had improved it, such college being purchasers in good faith had the right to say that the interests of the three heirs conveying to its grantor at least passed under the conveyance to it, and it could have compelled said heirs to have conveyed to such child, wife of its grantor, sufficient land adjacent to her own tract as would make up the deficit by reason of the conveyance to the college by her husband.

Mays v. Hannah, 11 Ky. Opin. 630.

(D) RIGHTS AND REMEDIES OF CREDITORS OF HEIRS AND DISTRIBUTEES.

§ 153. Right to subject interests in estate in general.

Where there is personal property in the hands of an administrator, in which an heir has an interest, the creditors of such heir may subject it to their claims after such interest is charged with indebtedness due the estate from such heir; and if there is not sufficient personal property the creditors may have his interest in the real estate sold to pay their claims.

Hall v. Harris' Admr., 8 Ky. Opin. 831.

Creditors have no claims, either legal or equitable, upon the estates or bounty of the ancestors of their debtors.

Moody v. Chiles, 9 Ky. Opin. 940.

§ 154. Interests or rights which may be subjected.

Where there is no administration of a decedent's estate, and a suit is brought against the widow, who has taken the property, no recovery can be had, where no averment is made that the personal property of decedent received by the widow was of greater value than she had a right by law to have set apart to her, before the payment of debts.

Avery v. Elder, 8 Ky. Opin. 623.

Where a will directs that the share of a child shall be held by the executor and the income therefrom paid to the child during his life, after the death of the widow, who was given a life estate in all the estate, the share of such child can not be sold to pay debts of his, for he is only entitled to the income of such property, and his creditors in no case could be entitled to more than his interest.

Moreland v. Woolfolk, 12 Ky. Opin. 110.

§ 157. Actions and other proceedings by creditors.

Where an administrator has been removed and a creditor of the decedent seeks to recover from heirs, his remedy is by an action in equity against the heirs and such an action should be transferred to the equity docket.

Harmon v. Higgins, 8 Ky. Opin. 259.

DESCRIPTION.

See Boundaries, I; Slaves, § 7.

In deed, see Deeds, § 115.

In indictment for forgery, see Forgery, § 28.

In judgment of real estate, see Judgment, § 226; Judicial Sales, § 47.

In mortgage of property, see Mortgages, §§ 48, 447.

In return of execution sale, see Execution, § 336.

In return of levy of execution, see Execution, § 140.

Insufficiency of description of land, see Judgment, § 226.

Of accused by indictment, see Indictment and Information, § 81.

Of debt secured by mortgage, see Mortgages, § 50.

Of improvement to be made, see Municipal Corporations, § 304.

Of land, see Boundaries, I; Frauds, Statute of, § 110.

Of land by will, see Wills, § 560.

Of land in commissioner's report, see Judicial Sales, § 30.

Of land in petition and mortgage, see Judicial Sales, § 36.

Of land ordered to be sold, see Judicial Sales, § 36.

Of property, see Indictment and Information, § 30.

Of property by execution, see Execution, § 81.

Of property by will, see Wills, VI, D.

Of property conveyed, see Deeds, § 37.

Of property in petition for ejectment, see Ejectment, § 64.

Of written instrument, see Indictment and Information, § 106.

Relative importance of natural objects and courses and distances, see Boundaries, § 4.

Sufficiency of, see Deeds, § 114.

DESERTION.

As ground for divorce, see Divorce, § 37.

DETINUE.**§ 25. Judgment.**

In an action to recover personal property under the old action of detinue, the judgment would have been in the alternative for the property, if to be had, and if not, its value; and under the provisions of Gen. Stat. (1881), ch. 38, art. 6, § 1, "the plaintiff may, if he so elect, take a writ of fieri facias for the assessed value of the thing recovered; and in either case he shall have execution for the damages assessed for the detention, and his costs."

Fowler v. Gordon, 11 Ky. Opin. 475.

DEVISEES.

See Wills, VI, B.

Indebtedness of to administrator, see Descent and Distribution, § 80.

Interest subject to execution, see Execution, § 45.

Rights and liabilities of, see Wills, VII.

DILIGENCE.

By assignee of note, see Assignments, § 133.

In procuring attendance of witnesses, see Continuance, § 26; Criminal Law, § 598.

Of executor in collection of debts due estate, see Executors and Administrators, § 86.

Required of bank cashier, see Banks and Banking, § 54.

DIRECTION OF VERDICT.

See Criminal Law, § 753; Forcible Entry and Detainer, § 31; Railroads, § 401; Trial, VI, D, §§ 135, 167, 168. In criminal prosecution, see Criminal Law, § 753.

When should not be granted, see Trial, § 168.

DIRECTORS.

Authority of, see Corporations, § 297.

DISAFFIRMANCE.

By infant, see Infants, §§ 30, 31.

DISCHARGE.

See Bills and Notes, VII.

As bankrupt, see Bankruptcy, §§ 418, 420.

Nature and modes of, see Bills and Notes, § 425.

Of prisoner, see Criminal Law, § 576.

Of receiver, see Receivers, § 204.

Of sureties, see Principal and Surety, III.

Prima facie evidence of, see Bills and Notes, § 436.

Rights of parties, see Bills and Notes, § 440.

Wrongful discharge of servant, see Master and Servant, § 40.

DISCLAIMER.

Operation as estoppel, see Estoppel, § 71.

DISCOUNT.

See Usury, § 26.

DISCOVERY.**I. IN EQUITY.****§ 26. Costs.**

Where a petition for discovery, in which several defendants are joined, merely calls on one of them to assert his claim to the property, if any, even though no answer be made, costs can not be adjudged against him.

Wathen v. Phillips, 4 Ky. Opin. 51.

DISCRETION.

Of county commissioners as to issuing or refusing to issue liquor license, see Intoxicating Liquors, § 69. Of court commissioner in sale of land, see Mortgages, § 512.

Of executor in sale of real estate, see Executors and Administrators, § 323.

Of master commissioner in sale of land, see Judicial Sales, § 7.

Of representatives of administrator, see Executors and Administrators, § 509.

Of Warehouseman, see Warehousemen, § 8.

DISCRETION OF COURT.

See Appeal, XVI, F; Criminal Law, § 1146.

Allowing further time for preparation of case, see Account, § 19.

Application for new trial, see New Trial, § 6.

Amendment of pleadings, see Appeal, § 959.

Appointment of receiver, see Receivers, § 29.

As to amendment of pleadings, see Pleading, §§ 233, 236.

As to entry of judgment in accordance with mandate of Court of Appeals, see Appeal, § 1207.

As to granting liquor license, see Intoxicating Liquors, §§ 69, 71.

As to time and place of sale of land, see Appeal, § 983.

Custody and care of children, see Divorce, §§ 296, 298.

Dismissal of action, see Dismissal and Nonsuit, § 51.

Granting or refusing continuance, see Continuance, § 7.

Of trial court, see Appeal, XVI, F.

Order of reception of evidence, see Criminal Law, §§ 680, 970.

Punishment for offense, see Lotteries, § 30.

Reopening sale, see Judicial Sales, § 34.

Ruling and motion for continuance, see continuance, § 7.

Setting aside verdict, see Judges, § 24.

Specific performance of contract, see Specific Performance, §§ 1, 8.

Taxing costs, see Costs, § 11.

DISFRANCHISEMENT.

Of voter, see Elections, § 90.

DISMISSAL AND NON-SUIT.

I. VOLUNTARY.

§ 3. Dismissal as to part of cause of action.

§ 4. Condition of cause.

§ 13. Estoppel or waiver of right.

§ 42. Operation and effect.

II. INVOLUNTARY.

§ 44. Nature and form of proceeding.

§ 46. Actions or proceedings which may be dismissed.

§ 49. Right to dismissal or non-suit in general.

§ 51. Power to dismiss or non-suit.

§ 53. Grounds in general.

§ 60. Want of prosecution.

§ 65. Dismissal by court on its motion.

§ 75. Dismissal without prejudice.

§ 80. Operation and effect.

§ 81. Setting aside, and reinstatement of cause.

See Appeal, XIII; Criminal Law, § 303.

Dismissal as to part of demand of petition, see Creditors' Suit, § 23.

Dismissal of appeal for failure to perfect in time, see Appeal, § 351.

Dismissal of attachment proceeding, see Attachment, § 91.

Irregularity of acts of court working dismissal of criminal charge, see Criminal Law, § 102.

Of action by infant without next friend, see Infants, § 78.

Of criminal prosecution, see Criminal Law, § 1131.

Order of dismissal is final order, see Appeal, § 67.

Waiver of right of dismissal, see Costs, § 120.

I. VOLUNTARY.

§ 3. Dismissal as to part of cause of action.

Where plaintiff dismisses his action, his petition, and so much of defendant's answer as makes a defense to the claim stated in the petition, are taken out of the record; but so much of the answer as sets up a set-off or counterclaim remains.

Rucker v. Baker, 7 Ky. Opin. 252.

§ 4. Condition of cause.

As long as no final judgment is pronounced and the chancellor retains control over a pending action, the plaintiff may dismiss his entire action at his costs.

Dumesnil v. City of Louisville, 11 Ky. Opin. 180.

§ 13. Estoppel or waiver of right.

Where on the granting of a new trial, on a motion to assess damages for the wrongful suing out of an attachment, the defendant, on motion, voluntarily consents to the assessment of damages by a jury, he can not subsequently, by motion, have the action dismissed.

Keith v. Wilson, 3 Ky. Opin. 672.

§ 42. Operation and effect.

Where appellant had dismissed his action on a note to which appellee had pleaded a set-off, there was then no suit pending between the parties, since appellee can not proceed with the trial as to her set-off.

Brown v. Young's Admx., 4 Ky. Opin. 701.

When a case has been dismissed the plaintiff and defendant are out of court, and a petition to be made a party can not be filed.

McCulloch v. Gallagher, 1 Ky. Opin. 164.

Where plaintiff discontinued his suit against O., plaintiff was thereby put out of court, and O.'s cross-petition against R. had no basis upon which to stand, and therefore failed.

Riddle v. Oldham, 1 Ky. Opin. 252.

II. INVOLUNTARY.

§ 44. Nature and form of proceeding.

A motion for non-suit is usually made immediately after the plaintiff has closed his evidence, on the grounds that the testimony fails to make out a cause of action against the defendant.

Towler v. Wilson, 5 Ky. Opin. 10.

§ 46. Actions or proceedings which may be dismissed.

A suit on a bond to perform a judgment that might be rendered in an action was properly dismissed, where no judgment appears to have been rendered.

Brown v. Dye, 7 Ky. Opin. 281.

§ 49. Right to dismissal or non-suit in general.

A non-suit should not be granted where there is enough evidence to authorize the submission of the case to the jury.

Blair v. Meshew, 7 Ky. Opin. 103.

Where the circumstances established go to fortify the parol evidence that appellant made a written proposition to a railroad to sell the lot sued for, which was accepted and paid for, and appellant permitted the railroad company to build its depot on the lot and use it for twelve years without objection, the judgment dismissing the petition was proper.

Reynolds v. Keith's Admr., 3 Ky. Opin. 646.

§ 51. Power to dismiss or non-suit.

It is erroneous to dismiss a cause of action, upon a rule to show cause why plaintiff's petition should not be stricken because no process was served since the preceding term.

Lewis v. Hawkins, 3 Ky. Opin. 452.

In the exercise of a sound discretion a court may sustain a motion to dismiss without prejudice, but after the cause has been regularly heard and submitted to the court for its decision on the merits, the plaintiff can not, as a matter of right, avoid the result of the trial by dismissing the cause without prejudice to another suit.

Helm v. Helm, 5 Ky. Opin. 532.

§ 53. Grounds in general.

The lapse of time and also the doubtful existence of a promise to pay, together with the positive denial of the defendant of the promise, were held to warrant the dismissal of the petition.

Jackson v. Jackson, 7 Ky. Opin. 650.

A petition to compel a specific execution of a contract to divide an estate, without reference to a will, will be dismissed where the evidence and circumstances of the case develop the knowledge of the suppression of the truth and a suggestion of what was not the truth, wholly incompatible with candor and fair dealing.

Aulick v. Aulick, 1 Ky. Opin. 158.

§ 60. Want of prosecution.

Where laches is attributable to a plaintiff whose cause has been pending, his cause may be dismissed for want of prosecution or without prejudice, since the practice of filing away civil causes and redocketing upon motion at a later date is not authorized by our code.

Whiley v. Myers, 13 Ky. Opin. 1063.

§ 65. Dismissal by court on its own motion.

The evidence was held not sufficient to sustain plaintiff's petition, and the petition was properly dismissed.

Phillips v. Burdin, 6 Ky. Opin. 542.

Where the defendant offered to confess judgment, and the court required the plaintiff to elect to allow him to do so, and on the refusal of the plaintiff to accept a judgment against the defendant, the action as to him was properly dismissed.

Dunn's Exrs. v. Thompson, 3 Ky. Opin. 635.

§ 75. Dismissal without prejudice.

A cause held not dismissible, absolutely, for want of preparation, but that it might be dismissed without prejudice.

Loretto Benevolence Assn. v. Pope, 7 Ky. Opin. 681.

Where a petition was filed in June, 1865, alleging certain facts which

would be proven by a witness running over a period of some nine years; and an answer to the petition was duly filed, and one year thereafter, no effort having been made to secure the testimony of the witness, the petition was dismissed; under such a state of facts, plaintiffs did not show due diligence, and the petition was rightfully stricken.

Ellison v. Shapleigh, 1 Ky. Opin. 590.

In the absence of an allegation, in a bill of review, that evidence offered to sustain same might not, by ordinary diligence, have been discovered in time to have been used on the first hearing, it is not error to dismiss the proceedings.

Harris v. Beazley, 2 Ky. Opin. 548.

Where petition was filed in the circuit court on a promissory note alleged to have been lost, and in the progress of the trial an amended petition was filed, stating that the note was entitled to a credit of \$35; the court did not err in sustaining a motion to dismiss the cause for want of jurisdiction, and in determining the question of jurisdiction the amended pleading should be regarded as qualifying and correcting the original petition, since the question of jurisdiction must be determined by the plaintiff's own assertion of his claim and not by the defense of his adversary.

Crawford v. Kidd, 2 Ky. Opin. 117.

Where in a suit to enforce a contract for the sale of lands, appellants filed a petition to be made parties, alleging they are the "owners of the land and interested parties;" and no facts are stated showing the character of their claim, or how it was derived, whether from devise, contract or inheritance; the claim is too vague and indefinite for judicial review, and the cross-petition was properly dismissed.

Burnside v. Robinson, 2 Ky. Opin. 135.

§ 80. Operation and effect.

A creditor's petition against an administrator may be dismissed upon a rule to show proper demand, but this

would not be a bar to another suit after such proper demand.

Green v. Merriweather's Admrs., 3 Ky. Opin. 636.

§ 81. Setting aside, and reinstatement of cause.

Where, notwithstanding an order dismissing the case, the parties acquiesced in the pendency of the litigation, the order will be treated as waived.

Noe v. Turner, 5 Ky. Opin. 452.

DISORDERLY HOUSE.

§ 1. Nature and elements of offenses.

§ 14. Evidence.

§ 18. Trial.

§ 20.—Instruction.

§ 1. Nature and elements of offenses.

The fact that disorderly crowds assembled in front of accused's house with his consent and in consequence of his house being there located, does not necessarily render accused guilty of keeping a disorderly house, it being not only necessary that he should consent to the assembly but that he should procure or encourage the assembly by the manner in which he kept his house or conducted his business therein.

John Madigan v. Commonwealth, 6 Ky. Opin. 252.

If by the manner in which accused kept his house, or by inducements held out by him, in connection with his house and the business therein carried on, he consented to or encouraged disorderly crowds to assemble on the sidewalk immediately in front of his house, he is guilty of keeping a disorderly house; but the mere fact that drunken and disorderly persons were permitted to assemble and did assemble on the sidewalk, is not sufficient to authorize a conviction.

John Madigan v. Commonwealth, 6 Ky. Opin. 252.

One who permits disorderly, drunken and noisy persons to frequent his house and thereby disturb the peace and quiet of the neighborhood, is guilty of keeping a disorderly house.

John Madigan v. Commonwealth, 6 Ky. Opin. 252.

§ 14. Evidence.

In the trial of one charged with keeping a bawdy house the state may prove the general reputation of the house, since this class of evidence is the best of which such a case is susceptible.

Burton v. Commonwealth, 11 Ky. Opin. 841.

§ 18. Trial.**§ 20.—Instruction.**

Where defendant was indicted for permitting the keeping of a disorderly house on premises owned by him, and an instruction, at the trial, was that "if the defendant did then and there in any house, or any premises in his possession or under his control, suffer any men and women," etc., to which an objection was made in that by use of the word "suffer" the jury were misled, as the defendant could not be punished for disorders committed unless in his house, or on his premises with his knowledge and by his permission, the use of the word "suffer" was in place of "permit" or "consent," and implies, in the connection in which it is used, a knowledge of improper conduct of those who met at his house or on his premises, and an acquiescence in the same, and therefore was not misleading to the jury.

Glackman v. Commonwealth, 2 Ky. Opin. 251.

DISSOLUTION.

Estoppel to deny dissolution of partnership, see Partnership, § 292.

Of attachment, see Attachment, §§ 226, 235.

Of corporation, see Corporations, XI.

Of educational corporation, see Colleges and Universities, § 11.

Of injunction, see Injunction, §§ 163, 168, 169, 184.

Of injunction—Damages, see Injunction, § 185.

Of partnership, see Partnership, VII.

Of partnership—Effect of, see Partnership, § 278.

Suit to dissolve partnership, see Partnership, § 315.

DISTRESS.

See Landlord and Tenant, VIII, D.

Distraining for taxes, see Taxation, § 581.

Liability for failure to levy distress warrant, see Sheriffs and Constables, § 106.

Trespass in execution of distress warrant, see Trespass, § 9.

DISTRIBUTEES.

Actions against, see Descent and Distribution, §§ 92, 137.

Estoppel to complain of amount, see Executors and Administrators, § 131.

Interests of, subject to execution, see Execution, § 44.

Liability for debts of decedent, see Descent and Distribution, §§ 119, 125.

Liability to estate, see Executors and Administrators, § 294.

Rights of creditors of, see Descent and Distribution, III, D.

Suit by for recovery of property transferred by deceased, see Descent and Distribution, § 88.

DISTRIBUTION.

See Descent and Distribution; Executors and Administrators, VII.

When bond required of distributee or legatee, see Descent and Distribution, § 73.

DISTRICT AND PROSECUTING ATTORNEYS

Duties of city attorney, see Municipal Corporations, § 166.

§ 4. Compensation and fees.**§ 5.—In general.**

To entitle the county attorney to the 15 per cent. allowed him by law, it must appear that he prosecuted in the committing court, and assisted or offered to assist the commonwealth's attorney in recovering judgment on the forfeited bond or recognizance.

Scott Walker v. J. W. Williams, 6 Ky. Opin. 230.

A county attorney is entitled to a reasonable salary out of the county levy, but as to the amount thereof the court of claims must judge, subject to the right of appeal to the circuit or to the common pleas court when the claim is for \$20 or more, and such

a case is triable de novo by such appellate court.

Gudgell v. Bath County Court, 10 Ky. Opin. 780.

DISTURBANCE OF PUBLIC ASSEMBLAGE.

§ 5. Indictment or information.

§ 6.—Requisites and sufficiency.

An indictment for disturbing religious worship, without stating how, is not sufficiently specific to notify the accused of the character of the proof he will have to repel, or so to identify the offense as to make the judgment a bar to another prosecution for the same act.

Commonwealth v. Jacobs, 3 Ky. Opin. 76.

The statute only makes it an offense to disturb persons assembled together when the disturbance is wilful, that is, acts done with a view of disturbing those assembled; and it is but a conclusion of law to charge that the accused unlawfully disturbed the assemblage.

Commonwealth v. Lawson, 9 Ky. Opin. 932.

DIVIDENDS.

Declaration and payment of, see Corporation, § 157.

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VI. CUSTODY AND SUPPORT OF CHILDREN.

§ 292. Condition or disposition of cause.

§ 296. Discretion of court.

§ 298. Grounds for award of custody.

§ 312. Appeal.

§ 312½. Costs.

Finality of judgment for divorce and alimony, see Appeal, § 76.
Jurisdiction of appeal from decree of divorce, see Appeal, § 41.

II. GROUNDS.

§ 14. Grounds existing at time of marriage.

§ 18. Fraud or duress in procuring marriage.

Where a woman was married in Germany and had several children, but abandoned her husband and married in this country without disclosing her antecedent history, it was held that the husband was entitled to a divorce on account of the fraud worked upon him, as well as on the ground that the parties had lived apart for five years.

Brockle v. Brockle, 13 Ky. Opin. 1076.

§ 27. Cruelty.

The evidence was held not to show that the wife was entitled to a divorce on the ground of cruel and inhuman treatment.

E. T. Williams v. J. M. Williams, 6 Ky. Opin. 391.

Where a wife sued for divorce on the grounds of the husband's confirmed habits of drunkenness, wasting of estate, cruel and inhuman treatment, and failure to provide, but appellee denied that he was an habitual drunkard, or that he wasted his estate, but did not deny that he failed to support his wife and children, and the proof shows that for at least one year before the separation the appellee remained out at nights, returned home drunk, and that he would not work, that he had sold his wife's gold watch and piano, and did not apply the proceeds to support of his family, and an alleged agreement to separate was not relied on or named in his answer to a former suit by his wife for divorce, the wife was entitled to a divorce.

Bawer v. Bawer, 1 Ky. Opin. 83.

Where evidence does not show for six months last past, the husband habitually behaved toward the wife in a cruel and inhuman manner, as to indicate a settled aversion to her, etc., no statutory grounds for divorce is shown.

Barnard v. Barnard, 4 Ky. Opin. 580.

§ 37. Desertion or absence.

Allegation and proof that the plaintiff and the defendant had lived separate and apart for more than five consecutive years, entitles either party to a divorce under § 1, art. 3, ch. 47, Rev. Stat., however reprehensible the conduct of either may have been.

John S. Logan v. Sarah Logan, 7 Ky. Opin. 89.

Where, by a petition, it is shown that abandonment without cohabitation was not within the limit of one year, it is not an available error that costs were awarded against him.

Forston v. Forston, 4 Ky. Opin. 428.

A wife is not entitled arbitrarily to insist on a husband selecting, as a home, one that is distasteful to him, and a refusal of a husband to so select, and life with the wife, is not grounds for a divorce.

McCormac v. McCormac, 4 Ky. Opin. 553.

Five years' separation without cohabitation, and the failure of the husband in that time to provide or attempt to provide a home for his family leave no doubt that he has, at any time since the separation, in good faith contemplated the resumption of his marital relations with his wife, and make out a statutory ground of divorce.

Addison v. Addison, 5 Ky. Opin. 225.

The acts of a husband were held not to amount to an abandonment of his wife in view of the circumstances of his absence.

Ellen Darling v. William Darling, 6 Ky. Opin. 684.

III. DEFENSES.

§ 47. Condonation.

§ 49.—Acts constituting condonation.

Where a wife, after acts of cruel treatment on the part of her husband, continued to live with him for several months prior to their separation, it did not constitute a condoning of the offense, especially where his subsequent habits and conduct toward her were bad.

Merritt v. Merritt, 6 Ky. Opin. 152.

IV. JURISDICTION, PROCEEDINGS AND RELIEF.

(A) JURISDICTION, VENUE AND LIMITATIONS.

§ 58. Jurisdiction of cause of action.

§ 62.—Domicile or residence of parties.

Where a wife leaves her husband, on the ground of cruel treatment by him, and takes up her abode in another state, she becomes a resident of the latter state so as to give the chancery court jurisdiction of a suit for divorce.

Mary S. Merritt v. Samuel W. Merritt, 6 Ky. Opin. 152.

A suit for divorce by the wife must be brought in the county where she resides, unless the husband resides in this state, in which case his domicile is in law the fixed residence of the wife, even though actually living elsewhere; and the courts of this state have jurisdiction to hear and determine her cause, and such jurisdiction is in the court of the county where her husband resides.

Dunlop v. Dunlop, 11 Ky. Opin. 188.

§ 64.—Acquisition of domicile for purpose of divorce.

As a general rule the domicile of the husband is the domicile of the wife; but, when the husband so mistreats the wife that she is entitled to be divorced from him, she has the right to abandon him and find a domicile of her own, and she may secure a divorce in the court having juris-

diction where her new residence is established.

Cowan v. Cowan, 9 Ky. Opin. 807.

(C) PLEADING.

§ 89. Bill, libel, complaint, or petition.

§ 90.—Form and requisites in general.

A petition for divorce on the ground of abandonment, which fails to allege that the abandonment was without the fault of the plaintiff, does not state a cause of action.

Owsley v. Owsley, 10 Ky. Opin. 667.

(D) EVIDENCE.

§ 110. Admissibility.

§ 119.—Desertion.

Where a husband seeks a divorce on the ground that his wife has abandoned him, he is required to prove facts showing such abandonment, and that it was her duty to return to him, and witnesses in such a case should state the circumstances and not their mere opinions that the wife abandoned the husband.

Self v. Self, 10 Ky. Opin. 835.

§ 123. Weight and sufficiency of evidence.

§ 124.—In general.

Where the weight of the evidence shows an abandonment of the wife by the husband for one year before the commencement of an action for divorce, it is sufficient to entitle the wife to the relief sought.

Hubert v. Hubert, 2 Ky. Opin. 408.

(F) JUDGMENT OR DECREE.

§ 153. Scope and extent of relief.

A divorce a mensa et thora, where the proof shows that though for some years her husband had been habitually drunk and had treated her cruelly, yet, within the statutory period of five years before institution of her suit, his intemperance was only occasional and unaccompanied by maltreatment, neglect or essential waste,

and had attempted a reconciliation and restitution of conjugal rights, is held to be all that the evidence justifies.

St. John v. St. John, 2 Ky. Opin. 599.

The confirmation by the judgment of the divorcing court, recognizing and legalizing a contract, makes it conclusively binding on both parties.

Chism v. Chism, 1 Ky. Opin. 10.

§ 164. Modification.

In a divorce proceeding, the court has power to modify its order as to the custody of children and allowances for their benefit.

Rogers v. Rogers, 8 Ky. Opin. 414.

§ 165. Opening or vacating.

A judgment in a suit for divorce may be annulled by the court granting it at any time as prescribed by the statutes, but it can only be done by the petition of the parties as prescribed by the code.

Dial v. Dial, 5 Ky. Opin. 633.

There is no mode of annulling a judgment for divorce except as prescribed by the code of practice, in which either party may file a petition for that purpose and the case is heard as other equitable actions.

Dial v. Dial, 5 Ky. Opin. 633.

The court granting a divorce has no power to vacate the decree at a term subsequent to the one at which it was rendered, except, perhaps, upon consent of all parties to it or upon the ground that it was procured by fraud.

Haley v. Haley, 13 Ky. Opin. 877.

To nullify a solemn decree rendered at a former term, something more is required than merely redocketing a case, which may be done for many purposes not inconsistent with or involving the vacation of the subsisting decree.

Haley v. Haley, 13 Ky. Opin. 877.

§ 169. Construction and operation in general.

A decree of divorce is binding upon all other tribunals or proceedings, direct or collateral, whether between

the same parties and their privies, or between strangers.

Mounts v. Dunville, 7 Ky. Opin. 688.

(G) APPEAL.

§ 176. Appellate jurisdiction.

The Court of Appeals has no jurisdiction to reverse a judgment granting a divorce.

Myers v. Myers, 11 Ky. Opin. 39.

§ 184. Review.

Where neither party is shown to be without fault, and the allowance for maintenance is reasonable, a decree of divorce will not be disturbed on appeal.

Reeves v. Reeves, 3 Ky. Opin. 607.

(H) FEES AND COSTS.

§ 196. Counsel fees and expenses of wife.

Where, in an action for divorce, it does not appear that the wife is wholly at fault, and she is the successful party, the husband is liable for the costs and attorneys' fees.

Glass v. Glass, 7 Ky. Opin. 623.

The value of the husband's entire estate should be ascertained and a reasonable allowance made out of it to the wife during the pendency of the suit for divorce, and also a reasonable sum for alimony.

Saffell v. Saffell, 1 Ky. Opin. 169.

By "sufficient" estate of her own mentioned in § 6, art. 3, ch. 47, 2 Rev. Stat. 21, is meant, that unless the wife has an estate of her own, the profits of which are sufficient for her comfortable maintenance, that an allowance shall be made out of the estate of the husband to supply the deficiency, or such an amount in view of the value of the husband's estate as shall be deemed equitable; and it was never contemplated by the legislature that no allowance should be made out of the husband's estate if the wife, by using and consuming the principal of her own estate, could maintain herself, but the allowance

for deficiency from husband's estate must be made on equitable terms.

McAllister v. McAllister, 1 Ky. Opin. 333.

In a wife's suit against her husband for alimony and divorce, he is by statute bound to pay a reasonable compensation to her attorneys as a part of the cost.

McAllister v. McAllister, 1 Ky. Opin. 632.

In defending a subsequent suit by the husband against the wife for divorce, an additional compensation to her attorney should be restricted alone to the value of his services rendered in defending that suit.

McAllister v. McAllister, 1 Ky. Opin. 632.

An order of court for a payment of \$300 to the wife for her maintenance in an action for a divorce a vinculo, was held not excessive, but necessary and proper by the action of the plaintiff in prosecuting her suit.

Holton v. Holton, 2 Ky. Opin. 533.

Under § 32, ch. 25, Rev. Stat., requiring the husband to pay all costs of a divorce suit, where the wife is not in fault, though the lower court granted the relief of the plaintiff, for which a reversal could not be had, costs were properly adjudged against him on the evidence, the wife proving their separation to be only temporary.

Holton v. Holton, 2 Ky. Opin. 533.

Though the evidence may show the services of attorneys for the wife, in divorce proceedings, to be worth \$300, in the absence of evidence as to the ability of the husband to make such a payment in that the estate is not ample, the court will not reverse the court below for an allowance of only \$150.

Huston & Taylor v. Drury, 2 Ky. Opin. 633.

In a divorce proceeding, on an application for payment of attorney's fees for representing the wife, the court, having knowledge from an inspection of the record of the amount and kind of services rendered, may

resort to its personal knowledge to fix the value of such services.

Rogers v. Rogers, 8 Ky. Opin. 414.

§ 197.—Liabilities of husband and wife.

A wife's estate can not be held liable for the payment of the husband's attorneys in an action by the wife for divorce.

Hopewell v. Hopewell, 6 Ky. Opin. 455.

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

§ 200. Power to make allowance or award.

The wife is not entitled to alimony when a divorce has been granted to her husband and denied to her.

Graham v. Graham, 8 Ky. Opin. 738.

§ 201. Jurisdiction of person and property.

Where a wife, without reasonable cause, voluntarily abandons her husband against his will, alimony should be refused her.

Forster v. Forster, 5 Ky. Opin. 385.

§ 208. Temporary alimony.

The authority of the court to allow the wife alimony pendente lite should or should not be exercised according to the facts developed in each particular case.

Forster v. Forster, 5 Ky. Opin. 385.

Section 6, art. 3, chapter 47 (2 Rev. Stat. 21), provides that pending an application for a divorce a court may allow the wife maintenance.

McAllister v. McAllister, 1 Ky. Opin. 333.

A contract of separation by husband and wife, with a provision which obligated the wife not to impose on him any liability "nor in any manner whatever, make him or his estate responsible for any money or debts other than the note before mentioned," is not a guarantee against an allowance, pendente lite, by the court of \$300 for the maintenance of the wife.

Holton v. Holton, 2 Ky. Opin. 533.

Notice of an application for maintenance is not required, where there is a personal service of the summons.
Strode v. Strode, 2 Ky. Opin. 332.

§ 209.—Nature and right in general.

Until such time as a husband in a divorce proceeding establishes by evidence the dereliction of the wife without his fault, he is legally bound to support her, and pending the suit, the wife being without adequate means, is entitled to alimony.

Caskey v. Caskey, 10 Ky. Opin. 678.

§ 215.—Amount.

The allowance of \$125 for the temporary support of the wife, pending a divorce, is a reasonable allowance where the husband's estate is worth \$4,000 or \$5,000.

Caskey v. Caskey, 10 Ky. Opin. 678.

§ 220. Allowance for counsel fees and expenses.

§ 221.—Nature and right in general.

The attorney for the wife in a divorce proceeding must look to his client for his compensation, where it is shown she has property sufficient to pay such compensation, and is not entitled to an order directing the husband to pay the same.

Bardsley v. Bardsley, 9 Ky. Opin. 265.

§ 230. Permanent alimony.

§ 231.—Nature and right in general.

Failure to allow a wife alimony was not error, where the wife had sufficient estate of her own for the comfortable support of herself and children, and the husband little or no estate.

Herrick v. Herrick, 7 Ky. Opin. 527.

§ 248. Disposition of property.

§ 249.—Rights in general.

Unlike initial dower, alimony does not become potential until a divorce is granted, or the commencement of a suit for it, and the husband's property, divested by mortgage or otherwise, can not be attacked by a retroactive lien on it for alimony.

Burton v. Stormes, 3 Ky. Opin. 160.

Where real estate is purchased from the earnings of the husband, and by his consent and direction is conveyed to the wife, he is not entitled to such real estate upon the granting of a divorce to the wife, where the wife has not been guilty of fraud in procuring the conveyance.

Hanlon v. Hanlon, 8 Ky. Opin. 724.

When the wife, suing for divorce and alimony, has her husband's property attached, her claims can not be defeated by pretended creditors of the husband, whose attachments issued first where it is made to appear that such creditor's claim was asserted to aid the husband to cover up his property from his creditors.

Darsh v. O'Neal, 9 Ky. Opin. 549.

§ 256. Lien of judgment or decree.

Where the husband had purchased real estate from his father and taken possession and paid for it, upon a divorce being decreed to the wife the court may attach the land, although the title is still in the father, and decree a lien in favor of the wife for the amount of alimony and allowance granted to her.

Hanning v. Hanning, 10 Ky. Opin. 249.

§ 260. Enforcement of order, judgment, or decree.

In a claim for alimony the rights of the wife as against the husband may be enforced and the property sold, or the property itself applied to her support and maintenance; but as to the husband's creditors whose claims existed prior to the claim asserted by the wife, the chancellor will not undertake to make a settlement upon her to the detriment of such creditors unless from the estate of the wife, and not even then if the creditors had obtained prior liens upon it by attachment or other writ.

Speers v. Reed, 12 Ky. Opin. 73.

§ 278. Appeal.

§ 287.—Determination and disposition of questions.

A judgment giving a wife alimony and the custody of a minor child will be reversed, where the evidence shows the wife to have been the sole cause of the estrangement and that her constant and bitter abuse of her

husband drove him from her bed and that she then abandoned him.

Orville v. Orville, 9 Ky. Opin. 562.

Where, in a divorce case, alimony is allowed in the sum of \$500 and is not disproportioned to defendant's estate, and is justified by evidence in the case, this court will refuse to reverse.

Myers v. Myers, 11 Ky. Opin. 39.

§ 288. Costs.

In judgments for alimony and divorce, the husband is required to pay the costs, unless it shall be made to appear in the action that the wife is in fault and has ample estate to pay the same, but where both parties are at fault and the means of the husband are very limited and the wife resides with parents who are amply able to provide for her, and besides she is given \$2,000 as alimony, the costs may be assessed against the wife.

Beall v. Beall, 12 Ky. Opin. 286.

VI. CUSTODY AND SUPPORT OF CHILDREN.

§ 292. Condition or disposition of cause.

The allowance of alimony to the wife is only an adjudication of her right and does not relieve the husband of the obligation to provide necessities for his infant children, and when such necessities are furnished by another he is bound therefor.

Young v. Young, 5 Ky. Opin. 266.

§ 296. Discretion of court.

Where the husband and wife are both of good moral character, and the child is of tender age, a judgment committing it to the custody of the mother will not be disturbed on appeal.

Thomas v. Thomas, 4 Ky. Opin. 176.

Under the law the right of the father to the custody and control of his children is superior to that of the mother, but the chancellor may subordinate this right when it is to the interest of the children to give the custody to the mother, and the legal right of the father will not be enforced to the prejudice of the children.

Rogers v. Rogers, 8 Ky. Opin. 414.

§ 298. Grounds for award of custody.

Where the proof shows a wife's temper, and her habit of using profane language, she is not a proper person to which to intrust the care and custody of a ten-year-old daughter.

Orville v. Orville, 9 Ky. Opin. 562.

§ 312. Appeal.

No appeal will lie to the Court of Appeals from a judgment rendering a divorce.

Kruty v. Kruty, 10 Ky. Opin. 230.

§ 312½. Costs.

Where a debt between the parties has been satisfied by their marriage it can not be restored to the wife when a divorce is granted to her.

Ratcliffe v. McGrewder, 8 Ky. Opin. 766.

DOCKETS.

See Trial, § 9.

DOCUMENTARY EVIDENCE.

See Evidence, X.

DOGS.

Liability of city for damages from bite of vicious dog, see Animals, § 68.

Liability of city for dogs killed by city officers, see Animals, § 44.

DOMICILE.

Of wife, see Divorce, §§ 62, 64.

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DOWER.

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§ 1. Nature and existence of estate.

§ 10. Property subject to dower.

§ 11. Estates and interests subject to dower.

§ 12.—In general.

§ 14.—Equitable estates in general.

§ 15.—Mortgaged property.

§ 17.—Partnership property.

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II. INCHOATE INTEREST.

(A) RIGHTS AND REMEDIES OF WIFE.

- § 29. Nature of inchoate interest.
- § 33. Assignability of inchoate interest.
- § 34. Sales and conveyances subject to dower.

(B) BAR, RELEASE, OR FORFEITURE.

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III. RIGHTS AND REMEDIES OF WIDOW.

- § 54. Dower consummates before assignment.
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- § 93. Division of rents and profits.
- § 100. Sale of land for purpose of assignment.
- § 103.—Disposition of proceeds.

§ 115. Rights and liabilities as to property taken in lieu of dower or statutory estate.

§ 116. Liens and enforcement thereof.

Levy and sale under execution, see Execution, § 31.

Release of dower in consideration of conveyances to wife, see Husband and Wife, § 47.

Release of dower interest as consideration of contract between wife and husband and creditors, see Husband and Wife, § 80.

Sale subject to dower interest, see Auctions and Auctioneers, § 8.

I. NATURE AND REQUISITES.

§ 1. Nature and existence of estate.

By the word "dower" is meant the widow's legal portion in both kinds of an estate, real and personal.

Smith v. Smith's Exrs., 3 Ky. Opin. 642.

§ 10. Property subject to dower.

Where the husband holds only an equity in land, the wife has no dower interest.

Green v. Ray, 1 Ky. Opin. 96.

There can not be dower in lands of which the husband during coverture was not actually seized or had not the right to an actual seizure.

Hall v. Campbell, 12 Ky. Opin. 270.

The moment a husband accepts a deed in fee simple to real estate his wife becomes invested with potential right to dower which can not be defeated by the destruction of such deed by the husband and by his procuring his grantor to make him another deed to the same real estate for his life with fee to others.

Martin v. Martin, 12 Ky. Opin. 283.

Where the husband holds land by executory contract and disposes of it, the wife is not entitled to dower; but where her husband receives conveyance of real estate by commissioner's deed and the sale is confirmed, the land being in two counties and the deed only recorded in one, she is en-

titled to dower in all of such land; and the transfer of such land by operation of law, or by reason of the husband's bankruptcy will not deprive the wife of dower.

Lane v. Judy, 12 Ky. Opin. 379.

A widow who did not join with her husband in a mortgage on his real estate, not having in any way relinquished her right to dower in the lifetime of her husband, is entitled to dower in said property.

Powell v. Calvert, 12 Ky. Opin. 536.

The widow is not entitled to dower in real estate sold to satisfy the lien for the purchase-money of the land.

Poor v. Leavell, 12 Ky. Opin. 545.

§ 11. Estates and interests subject to dower.

§ 12.—In general.

A will bequeathing to a wife certain specific personal property to be by her disposed of as she may deem best, does not give to her an additional dower interest in the remainder of the personal property.

Ormsby v. Zanone, 4 Ky. Opin. 159.

A court of equity may properly sell so much of a decedent's land as is necessary to pay the purchase money due, free from the widow's dower.

Payton v. Stagner, 2 Ky. Opin. 385.

The wife is entitled to dower in the real estate of her husband assigned for the benefit of creditors.

Miller v. Gray, 2 Ky. Opin. 101.

Where the decedent advanced to his daughters a tract of land each in which the widow claims dower, in the settlement of the estate the value of the dower should be deducted from the price of the land with which the daughters are charged as an advancement.

Lane's Heirs v. Shearer, 5 Ky. Opin. 613.

Where the widow has a dower interest in a house and lot which not being susceptible of being partitioned has to be sold, her interest shifts to the proceeds of sale and it is error

for the court to fix the value of her interest before sale.

Gorman v. Grimes, 8 Ky. Opin. 767.

The widow's right to dower in her late husband's real estate can not be defeated by the assertion of others that such real estate was in fact held in trust for them, where there is nothing of record showing any such trust, and where the widow had no notice or knowledge of any such secret trust.

Pike v. Pike, 9 Ky. Opin. 520.

Where the husband has been seized beneficially by an equitable title to real estate, and so continues up to his death, his widow is entitled to dower; but where the husband has no beneficial interest in land, and it is acquired for the benefit of and conveyed immediately to others, the wife is not entitled to dower therein.

McIlvaine v. McIlvaine, 10 Ky. Opin. 181.

A woman is not entitled to dower in real estate conveyed by the husband in good faith before her marriage to him.

Moody v. Moody, 11 Ky. Opin. 381.

Where a decedent is not occupying real estate at the time of his death, and had not done so for eight years prior thereto, the widow is not entitled to a homestead right therein, but is entitled to dower in said property, and it should be allotted to her.

Preston v. Preston, 13 Ky. Opin. 507.

Where a husband gives to his son by parol certain real estate, but dies without having conveyed it to him, if the facts are such that the husband had a right to seizin, then upon his death his widow is entitled to dower in it.

Eubank v. Eubank, 13 Ky. Opin. 673.

Where the husband has title to land and gives it to his son, who takes possession and improves it, and continues in such possession for more than thirty years, his title is good without a conveyance; and where such husband dies, his widow is not

entitled to dower therein; but as to land which was conveyed to the husband long after his gift to the son, but which is included in the boundary of such gift, the widow has a right to dower.

Smith v. Meyers, 13 Ky. Opin. 830.

§ 14.—Equitable estates in general.

Where a husband pays a valuable consideration for land, acquiring the legal title without notice of the rights of a lienholder, the widow is entitled to dower.

Adams v. Collier, 8 Ky. Opin. 323.

§ 15.—Mortgaged property.

A married woman who joins in a mortgage on her husband's real estate thereby divests herself of dower therein the same as if she joins in a deed conveying such property; and her right to dower in mortgaged property where she has joined in the mortgage is subject to the rights of the mortgagee.

Mechanics' Mutual Saving Assn. v. Gatti, 9 Ky. Opin. 356.

Where a wife does not join in a mortgage on real estate, upon the death of her husband she is entitled to have her dower therein set off to her, and where she is not asserting any homestead right as against the mortgagee, there is no reason for lessening the value of her dower by reason of the homestead exemption made during the life of her husband.

Hopkins v. Holmes, 10 Ky. Opin. 374.

§ 17.—Partnership property.

Partnership property is subject to the partnership debts before the claim to dower or homestead can be successfully asserted.

Ellis v. Johnson, 12 Ky. Opin. 163.

Partnership real estate is regarded as partnership assets for the payment of partnership liabilities, and before the widow or heir can claim, the firm debts must be paid and the rights of the partners in the partnership estate determined, and partnership real estate is deemed personalty when by agreement, express or implied, the partners intend it to be treated as a part of their capital stock.

Bowler v. Blair, 13 Ky. Opin. 324.

Where partnership real estate is intended only as partnership stock, the claim of the widow or heir of one of the partners to dower can not be asserted, so as to affect the rights of a surviving partner; but where the claims of the partnership are satisfied, unless the articles of partnership show a different intention, the widow and heir may claim dower.

Bowler v. Blair, 13 Ky. Opin. 324.

Where real estate has been purchased in the joint names of the parties forming a partnership, with firm means, and so held, in the absence of any agreement between them to the contrary it must at law be regarded as held by them as tenants in common, but in equity it must be treated as held by them in trust for the firm, subject to the rules applicable to partnership personalty and liable for the firm debts and the claims of each partner upon the others; and after these claims are satisfied the residue of it will belong both at law and in equity to the partners as tenants in common, and where the wife of one of such partners has not joined in conveying her interest and he dies, she is entitled to dower in his undivided interest held during coverture.

Given v. Clark, 13 Ky. Opin. 676.

In the absence of such facts and circumstances as warrant the court in finding that it was intended or agreed by the partners that their real estate should be regarded as personalty for all purposes, it should only be so regarded for the purpose of the partnership, and after these are answered the surplus should be held to be real estate for other purposes; and the wife of one of the partners who died would be entitled to dower in such real estate, if she had not waived such right according to law.

Long v. Watts, 13 Ky. Opin. 723.

§ 22. Extent of right.

Where a father bought a tract of land and directed the vendor to convey it to his daughter, and a few hours before the father's death he called on the grantor to remember his promise to the daughter; and no deed or writing having been made between the parties, a direction to convey to the daughter, and future recognition

of the gift by her father, must be regarded as a gift of either the money or land to her, and the title never being in the father, either equitable or legal, the widow is not entitled to dower.

Bottom v. Chandler, 2 Ky. Opin. 453.

A homestead allotted to a widow and infant children shall be estimated in allotting dower, and if the dower allotted is not equal in value to a homestead, that fact should have been made to appear in order to show that the widow was prejudiced by the failure to allot to her a homestead.

Donaldson v. Donaldson's Admr., 9 Ky. Opin. 618.

§ 28. Rights of creditors of husband.

In an action by creditors to subject land to the payment of their debts, which had been conveyed to the wife by the husband, the wife can not assert her claim to dower.

Shanklin v. Shackler, 7 Ky. Opin. 577.

The husband's real estate is liable for his debts, and where in compromise of a creditor's claim the wife refuses to join in a conveyance of her husband's property, unless she receives in cash a sum much larger than her dower interest, and such sum is paid to her and invested in other real estate, and the deed taken in her name, it is still liable for debts owing by her husband and may be sold to pay such creditor, and the wife has only a first lien on the funds derived to the extent of the value of her dower in the husband's property first sold.

Jackson v. Potter, 13 Ky. Opin. 188.

II. INCHOATE INTEREST.

(A) RIGHTS AND REMEDIES OF WIFE.

§ 29. Nature of inchoate interest.

The acceptance of a vendee, of a husband's conveyance, while having the effect to estop the purchaser's vendees from denying that the husband had title, it can not be construed into an admission that he held such an estate in the land as will entitle

his surviving wife to dower, without proof by her that he was seized and possessed of the land in fee simple.

Boon v. Givens, 4 Ky. Opin. 569.

The husband's title to land sold under decree may be acquired, but this does not divest the wife of her right of dower therein.

Myers v. Happeron, 3 Ky. Opin. 628.

A wife is not endowed with lands purchased and paid for by her husband, but which he held merely a title bond for, and which the husband had conveyed to creditors by deed of assignment, although at the sale of all lands under the assignment, the officer proclaimed "subject to the right of dower of * * *"

Burton v. Robinson, 4 Ky. Opin. 451.

§ 33. Assignability of inchoate interest.

Before the assignment of a widow's dower, she has an interest in her deceased husband's estate which is the subject of bargain and sale, like any other inchoate interest in realty.

Wintersmith v. Goodin, 4 Ky. Opin. 67.

The wife can pass a dower interest by deed, and her creditors can have the dower allotted and subject same to their claims.

Wintersmith v. Goodin, 4 Ky. Opin. 67.

§ 34. Sales and conveyances subject to dower.

Where the husband, before his death, conveys real estate, the deed not purporting to convey the wife's interest, her name not appearing in its body, she, however, signing and acknowledging such deed, her dower is not canceled and she may, after her husband's death, assert her claim of dower.

Lemming v. Mullins, 13 Ky. Opin. 194.

(B) BAR, RELEASE, OR FORFEITURE.

§ 37. Statutory provisions.

A wife's dowable interest in the

husband's land ceases upon her second marriage.

Payton v. Stagner, 2 Ky. Opin. 385.

§ 38. Power of husband in general.

A devise to children of "all my estate, real, personal and mixed, subject to the dower interest to my wife, as specified in the second clause above," limits the dower to the use of the personal and real property during life.

Ormsby v. Zanone, 4 Ky. Opin. 159.

§ 39. Power of wife in general.

The refusal of the wife to relinquish dower can not enure to the husband's benefit.

Salter v. Salter, 9 Ky. Opin. 89.

§ 41. Antenuptial settlements and agreements.

Where, in a marriage contract, it is not manifest that the wife was to relinquish any of her marital rights in the property of her intended husband, she is entitled to dower in the husband's land.

Palmer v. Palmer, 7 Ky. Opin. 29.

§ 46. Judicial sale of property.

A wife's consent to a judicial sale of her husband's land and her acceptance of a part of the purchase money estopped her from asserting her contingent right of dower.

McIlvain v. Moss, 3 Ky. Opin. 508.

Where a wife gives her consent to a judicial sale of her husband's land and accepts a part of the purchase money, she is estopped from asserting her dower right in the land.

McIlvain v. Moss, 3 Ky. Opin. 508.

The wife is entitled to claim dower in her husband's real estate sold at the judgment of creditors, and bought by a purchaser subject to the wife's claim; and she is not precluded from asserting her claim because of the fact that her husband or creditors have given her \$1,000, when she has done nothing to release her dower claim.

Young v. Strother, 11 Ky. Opin. 575.

§ 49. Conveyance or release by wife.

An assignment by a step-mother to her step-son, of her contingent right of dower and distribution in his father's estate, in exchange for lands he owned, is without consideration, especially where her husband had not signed same.

McCain v. Crabtree, 3 Ky. Opin. 565.

A married woman is not bound by her verbal contract to relinquish her dower, but has a right to abandon it.

Elliott v. Spencer, 1 Ky. Opin. 97.

Where title to the property conveyed to a wife in consideration of relinquishment of dower vested in her, she has no right to abandon the contract and still claim the property.

Elliott v. Spencer, 1 Ky. Opin. 97.

The wife must renounce her husband's will before she can have dower assigned.

Payton v. Stagner, 2 Ky. Opin. 385.

Where infancy is set up to avoid the effect of a deed relinquishing dower more than twenty years after the execution of the deed and after the old family bible in which her age was recorded is lost or destroyed and only an alleged copy is in existence showing such birth, the entry of which was made by one who married into the family, and the evidence of infancy is generally unsatisfactory, and the father of such child testifies positively that she was over twenty-one years of age when the deed was executed, should create in the chancellor's mind much doubt as to such infancy and such petition should be dismissed.

Shawhan v. Smith, 11 Ky. Opin. 814.

Where a married woman relinquishes her dower in the body of the deed, and signs and acknowledges the instrument, her right to dower passes.

Stone v. Stubblefield's Admr., 13 Ky. Opin. 119.

§ 50. Estoppel.

Where appellant appeared in open court at the term at which a commis-

sioner reported the sale of her husband's land and relinquished her right to dower therein, such relinquishment did not, as a matter of law, divest her of her right to dower, but estopped her from asserting such right against those who acted upon the faith of it, and purchased a part of the land on the impression, due to such voluntary act, that it was free from such incumbrance.

Ellis v. Grider, 6 Ky. Opin. 29.

When the land in which a married woman claims dower was sold under decretal sale in an action to which she was a party, and having failed then to assert claim, she is estopped to enforce it now.

Stone v. Stone, 10 Ky. Opin. 33.

Where a widow has accepted the provisions of the husband's will she is not entitled to dower.

Meyers v. Pointer, 10 Ky. Opin. 187.

Where a married woman, to induce the court to set aside a sale of her husband's real estate subjected to pay his debts, offers to join in a resale and convey her dower interest, and a resale is ordered, the sale made and the purchase-money paid, and a commissioner of the court has conveyed the interest of the husband and wife, such married woman is estopped after the death of her husband to claim dower in such land.

Jacobs v. Wurtz, 10 Ky. Opin. 801.

Where a married woman relinquishes her dower upon condition that a judicial sale be set aside, and the land be sold over again, and such sale is not set aside the relinquishment will not prevent her from asserting her right of dower in such land.

Martin v. Wurtz, 10 Ky. Opin. 854.

While a married woman may estop herself from asserting a claim of dower, the doctrine should not be carried too far or interposed unless the proof establishes that her conduct has misled bona fide purchasers, and has induced them to part with their money in a manner they would not have otherwise done; and a representation by the court's commissioner or other persons that a married woman has re-

linquished her dower can not be attributed to a married woman as a fraud which will bar her claim of dower.

Martin v. Wurtz, 10 Ky. Opin. 854.

§ 53. Restoration of right.

Where the wife has given a relinquishment of her right of dower, though the commissioner, when selling the land, proclaimed that the wife had a potential right of dower in it, this would not have the effect of restoring her right.

Taylor v. Crawdus, 4 Ky. Opin. 423.

Where at the sale of lands for which the purchaser held only a title bond, the officer proclaimed that the wife's dower interest was reserved, and such fact was reported to the court by the commissioner in his report of the sale, such fact does not enlarge the wife's right of dower, nor bind the purchaser to yield to her a greater interest in the form of dower than she might have enforced against the creditors as vendees of her husband.

Burton v. Robinson, 4 Ky. Opin. 451.

III. RIGHTS AND REMEDIES OF WIDOW.

§ 54. Dower consummated before assignment.

§ 56.—Rights of widow in general.

A clause in a will providing for the support of the widow out of the estate of the testator can not be regarded as having been made in lieu of dower.

Wall v. Goode, 7 Ky. Opin. 17.

A will held not to deprive the wife of her right to dower in the land of her deceased husband, notwithstanding provision was made in the will for her support and she was given a small part of the personal property of the estate.

Wall v. Goode, 7 Ky. Opin. 17.

A widow is entitled to dower and to occupy the mansion house until the assignment of such dower or the sale of the property.

Cass v. Smith, Blair & Co., 13 Ky. Opin. 613.

§ 57.—Assignability of interest, and conveyance or release.

A married woman may alienate her potential right of dower, but can only do so by record.

Rogers v. Isaacs, 6 Ky. Opin. 518.

Before a grantee of a widow's dower can be subrogated to the rights of the widow, he must set up in his pleading that dower has not been assigned her out of her husband's estate, and ask to be substituted to her rights, and he must plead facts showing that she was entitled to dower.

Kaufman v. Landers, 9 Ky. Opin. 479.

Where a woman owning a dower interest leases it for life to another for \$50 per annum, and the lessee transferred it to another, who did not assume to pay the annual charges, but took possession, he became liable to pay the value of the annual dower interest, and the woman owning it may recover it and have the dower interest sold to pay the rental.

Sutherland v. Nunn, 13 Ky. Opin. 1078.

§ 59.—Election between homestead and dower.

A widow being entitled to dower in realty left by her husband and also to a homestead in such property, may assert either, but can not claim both.

Funk v. Walters, 12 Ky. Opin. 761.

§ 60.—Rights of creditors of widow.

The sale of the wife's dower interest in land was held not to enure to the benefit of all the creditors of the wife.

Adams v. Howard, 6 Ky. Opin. 84.

The facts held to show that the legal title to the dower interest of the wife passed on the death of the wife and her husband, under 1 Rev. Stat., p. 281, ch. 24, § 15, and a subsequent purchaser at execution sale against her took nothing.

Adams v. Howard, 6 Ky. Opin. 84.

§ 65. Rights pending assignment of dower.

The wife has the right to have the lands belonging to her deceased husband cultivated until her dower is assigned.

Rousseau & Wells v. McClure, 2 Ky. Opin. 416.

§ 66. Statutory provisions as to assignment.

Under Civil Code Practice, § 549, County Courts have not only the right to assign dower, but jurisdiction to determine the right of a petitioner for dower.

Lawson v. Johnson, 7 Ky. Opin. 193.

§ 68. Assignment by act or agreement of parties.

It is the duty of heirs to have the widow's dower allotted her and upon their failure to do so, it was right and proper for her to institute proceedings against them, for that purpose, and the cost of such a proceeding must be paid by the heirs.

Butler v. Butler, 4 Ky. Opin. 653.

§ 70. Actions for dower.**§ 71.—Nature and form of remedy.**

Nothing can be presumed in favor of the regularity of a proceeding by warning order; but the record must show upon its face that the provisions of the Code have been substantially complied with.

Moore v. Speed, 7 Ky. Opin. 238.

§ 72.—Right of action and defenses.

The allegation in an answer to a petition of a widow for dower, that she had received a thousand dollars' worth of property from her husband, constitutes no bar to her right of dower.

Horn v. Mize, 10 Ky. Opin. 809.

Neither the husband guilty of alleged fraud, nor those claiming under him as volunteers, or who accept conveyances from him with knowledge that they were made for a fraudulent purpose, can be heard to say that the husband was not seized of the land during coverture, in order to defeat the wife's claim to dower.

Fannessey v. Fannessey, 10 Ky. Opin. 788.

Where, during the lifetime of a husband, the wife claims a homestead in her husband's real estate as against the foreclosure of a mortgage in which she did not join, claiming it in her own right, and it has been allowed to her and paid to her out of the proceeds of the sale, in a suit for dower after her husband's death, where she

alleges that she has received such cash in lieu of her homestead and that she then has it, a court of equity will charge it to her, and her own recitals estop her from saying that it should not be done.

Holloway's Exr. v. Harris, 13 Ky. Opin. 383.

§ 76.—Parties.

Before a judgment can be rendered awarding dower to the widow the children must be parties to such action.

Nelson v. Rose, 8 Ky. Opin. 371.

§ 78.—Pleading.

Where an answer alleges the facts sufficient, if true, to constitute a potential right of dower in the land, which defendant had a right to have protected by the court, it is good as against a demurrer.

Berry v. Martin, 6 Ky. Opin. 44.

§ 81.—Judgment or decree for dower.

If dower is given to a widow in an action to sell the real estate of her late husband, it is binding upon all parties to such proceeding, whether she is entitled to dower or not, and it can not be questioned by them after sixteen years from the date of such judgment.

Allen v. Allen, 12 Ky. Opin. 150.

§ 82. Appointment and proceedings of commissioners or referees to make assignment.

The acts of commissioners appointed to allot dower should be approved, unless there is a very apparent reason for disturbing their action.

Holmes v. Hopkins, 12 Ky. Opin. 245.

Where the judgment appointing commissioners to allot dower fixes the time and place of their meeting, and they meet in accordance with such order and adjourn to another day, no additional notice is required to bind the parties to such action.

Bell v. Coleman, 13 Ky. Opin. 403.

§ 83. Valuation and selection of property for assignment.

§ 84.—In general.

An allowance of \$500 to a widow in lieu of the property required by statute to be set apart to her, was

proper, unless she received other property or money equivalent to the exempt property without charge.

Shawhan v. Taylor, 4 Ky. Opin. 573.

A voluntary petition between tenants in common, if free from fraud and fairly made, will have the effect to transfer the dower of the wives of the partitioners to the lands allotted in such partition, and the wife of one party to the partition thereby relinquishes her claim of dower in the land given to the other.

Gross v. Leiber's Admr., 10 Ky. Opin. 316.

§ 87.—Improvements.

Where a widow is entitled to dower in five hundred acres of land purchased by three different grantees, who have each made valuable improvements on their land, proof should be taken of the value of the improvements made by each of the purchasers and of the value of the improved land in the possession of each, and dower should be allotted so as to put an equal portion thereof upon the lands of each in proportion to the quantity held by each, in order that each may be made to contribute equally out of the land received by each according to its quantity and value.

Horn v. Mize, 10 Ky. Opin. 809.

§ 93. Division of rents and profits.

The widow to whom dower in land is allotted is only entitled to the rents from the institution of the action and not from the death of the husband.

Holmes v. Hopkins, 12 Ky. Opin. 245.

§ 100. Sale of land for purpose of assignment.

§ 103.—Disposition of proceeds.

Where a married woman has consented upon the record by an answer sworn to and filed, to take a part of the proceeds of the sale in lieu of her potential right of dower, and it is afterward decreed that she is entitled to dower, it is error for the court not to enforce the agreement; but such error can not affect the purchaser, since she is entitled out of the proceeds of such sale to receive the value of her dower.

Wright v. Boyd, 10 Ky. Opin. 277.

When the heirs and devisees of the husband, over the claim and protest of the widow, receive all the money from the sale of real estate, they become liable to her for dower.

Boyd v. Boyd, 10 Ky. Opin. 548.

§ 115. Rights and liabilities as to property taken in lieu of dower or statutory estate.

Where property was conveyed to a wife in lieu of dower in other property, the court will not disturb her right to the property which accrued prior to the debt sought to be enforced against the husband and to subject the property.

Bell v. Redman, 7 Ky. Opin. 217.

§ 116. Liens and enforcement thereof.

Where a widow conveys her dower interest in land, taking notes for the purchase-price, but reserving a lien on such interest to secure the payment of the purchase money, she may enforce such lien against the creditors of her grantee; and the fact that there was included in such notes certain other indebtedness to her from such grantee will not prevent her from enforcing her lien to the extent of such purchase money, where the sum due on such lien can be ascertained.

National Bank of Lancaster v. Slavin's Trustees, 10 Ky. Opin. 739.

DRAFTS.

See Bills and Notes.

DRUGGISTS.

Sale of intoxicating liquors by druggist, see Intoxicating Liquors, § 152.

DRUNKARDS.

§ 3. Guardians or committees.

In a trial of a proceeding instituted by children to enjoin a parent from disposing of his estate and asking for the appointment of a committee for him on the ground of mental imbecility produced by old age, disease and the excessive use of intoxicants, an instruction is correct charging that if the jury believe from the evidence that the parent, by reason of the infirmities of age or the excessive use

of liquor, or disease, is not possessed of capacity adequate to the reasonably prudential management and control of such property, with safety to his own interests and the just and lawful demands of his family, they must find defendant not capable of exercising dominion over his property.

Stevenson v. Stevenson, 13 Ky. Opin. 1012.

Where one is shown to be mentally incompetent to care for himself and his estate, he is as much entitled to the protection and care of a court of equity as is one who is technically a lunatic, and this protection may be secured upon the petition of next friends.

Stevenson v. Stevenson, 13 Ky. Opin. 1021.

DUE PROCESS OF LAW.

See Constitutional Law, XI.

DUPLICITY.

See Indictment and Information, § 125; Pleading, § 64.

DURESS.

What constitutes, see Mortgages, § 79.

DYING DECLARATIONS.

See Homicide, VII., C.

Admissibility in evidence, see Homicide, § 215.

EASEMENTS.

I. CREATION, EXISTENCE AND TERMINATION.

§ 4. Prescription.

§ 5.—In general.

§ 15. Implication.

§ 17.—Ways in general.

§ 26. Termination in general.

§ 36. Evidence.

II. EXTENT OF RIGHT, USE, AND OBSTRUCTION.

§ 46. Location

§ 48.—Ways.

§ 52. Persons entitled to use.

§ 56. Obstruction or disturbance.

- § 61. Actions for establishment and protection of easements. for its use in common; and its use for a long time and its repair by those interested created a right which can not be disturbed without their consent.
- § 62. Actions for damages for injuries.
- § 64.—Rights of action and defenses.
- § 71.—Damages.

Turner v. Goodman, 11 Ky. Opin. 136.

I. CREATION, EXISTENCE AND TERMINATION.

§ 4. Prescription.

The right to a private passway may be acquired by continual use for 15 years under claim of right.

Coburn v. Whirner, 5 Ky. Opin. 17.

§ 5.—In general.

Where a spring located on or near the dividing line between two land-owners has been for a long period of time recognized as a partnership spring, and verbal assurances have been made by each immediate vendor to his vendee that the spring was a partnership spring, and that the owners of both tracts were entitled to use the water, they each have a right to its use; and if the correct boundary line disclosed that it is located on one side of the line, the owner of the tract on the other side has an easement in the use of the spring that he can not be deprived of without his consent.

Rountree v. Lewis, 11 Ky. Opin. 68.

Where one is permitted in building his building to make the wall of another a part of his wall by building up to it and inserting his timbers on it for support, and the wall stands for many years, he secures and has an easement in such wall.

Smith v. Martin, 11 Ky. Opin. 818.

§ 15. Implication.

A right to a passway by necessity arises in case the vendor owns lands entirely surrounding the land sold by him.

Robinson v. Owsley, 5 Ky. Opin. 570.

§ 17.—Ways in general.

The fact of a passway having been located over the lands of those in interest was a sufficient consideration

Where a right of a roadway is secured by contract between the owner of a quarry and the original owner of land, and the way has been in use for near twenty years, upon the land being partitioned the way must be left open or another furnished the owners of the quarry, equal in convenience to the old way.

Louisville Tpk. Co. v. Shadburn, 12 Ky. Opin. 377.

Where a landowner agrees to the discontinuance of a public highway in consideration that he and his successors in the ownership of the land shall have a right of way out to a highway, the right can not be denied to him.

Evans v. Miller, 12 Ky. Opin. 405.

§ 26. Termination in general.

One who owns an easement to pass over the land of another, evidenced by a written contract based upon a valuable consideration, can not be deprived of his easement by the grantee of him who has granted the easement, when the grantee of the land had notice of the existence of such easement when he purchased.

Porter v. Barclay, 13 Ky. Opin. 1090.

§ 36. Evidence.

The evidence was held to show a prescriptive right to a passway over lands to a public highway, by the use of the passway for more than 30 years by persons on the adjoining farms.

Dwyer v. Bass, 6 Ky. Opin. 657.

A private passway can not be created by dedication; but it must be granted, and this grant must be proven, either by a writing, or by a continued use and enjoyment, under a claim of right, for the term of fifteen years.

Robinson v. Owsley, 5 Ky. Opin. 570.

II. EXTENT OF RIGHT, USE, AND OBSTRUCTION.

§ 46. Location.

§ 48.—Ways.

A passway located by the trial court in accordance with the terms of a bond for a deed, was held to be convenient and fair to both parties, and will not be disturbed on appeal.

Finn v. Rochford, 13 Ky. Opin. 357.

Where a bond for a deed contained a reservation of a right of way over the land, but did not locate the right of way, and the bond has been destroyed by fire, the court upon proof will locate such right of way in a manner so as to injure the land owner the least.

Finn v. Rochford, 13 Ky. Opin. 357.

Where, in the partition of land, the commissioners provide in their report that each of the heirs to whom separate lots of land are awarded shall have the right of a passage over the lands of the others, but failed to locate the same, it is not to be construed as meaning that one was to have a passageway wherever he desired over the land of another, but such a way as might be reasonably necessary, to be located as far as practicable with regard to the advantages and disadvantages of the parties.

Vancleave v. Hamilton, 13 Ky. Opin. 720.

§ 52. Persons entitled to use.

Where one purchases real estate and takes possession of the same without any notice or knowledge that a third person had been granted the right to use a well on the premises by the owner's grantor, the owner can not be ousted from the possession of such well, and notice must be alleged and proved before his rights can be affected.

Sharpe v. Matthews, 12 Ky. Opin. 27.

§ 56. Obstruction or disturbance.

One who has continuously used and claimed the right to use an easement or passway for more than twenty years has the right to remove obstructions placed therein, and can not

be held liable for trespass for doing so.

Downey v. Urton, 10 Ky. Opin. 143.

§ 61. Actions for establishment and protection of easements.

Where in plaintiff's petition it is only shown that a party and the public at large for more than fifteen years from a certain date continuously and uninterruptedly used a certain passway, claiming and holding the same as a passway, the petition is not good as an averment of adverse holding under a claim of right, but where only an answer denying the averments is filed, its filing cures the defects in the petition.

Hickman v. Sewell, 11 Ky. Opin. 153.

§ 62. Actions for damages for injuries.

§ 64.—Rights of action and defenses.

One who buys real estate by contract, knowing at the time that there is a private right of way over it, can not refuse to perform his contract on account of such easement.

Burton v. Shotwell, 9 Ky. Opin. 676.

§ 70.—Damages.

Where one under a contract is entitled to a conveyance of a right of way, which it is agreed he shall receive on a certain date, but which he does not receive at that time, but he is permitted during all such time to use and enjoy such easement, he is only entitled to nominal damages in a suit for failure to convey such easement to him.

Freeman v. Cooney, 9 Ky. Opin. 657.

EJECTION.

Of passengers or intruders, see Carriers, IV, F.

EJECTMENT.

I. RIGHT OF ACTION AND DEFENSES.

§ 8. Title to support action.

§ 9.—In general.

§ 12.—Equitable title.

§ 19. Possession of defendant.

§ 22. Defenses.

§ 24.—Adverse possession.

§ 33. Persons entitled to sue.

II. JURISDICTION, PARTIES, PROCESS, AND INCIDENTAL PROCEEDINGS.

§ 36. Jurisdiction of subject-matter.

§ 37. Jurisdiction of the person.

§ 40. Parties plaintiff.

§ 41.—In general.

§ 48. Notice to tenant and entry of consent rule.

III. PLEADING AND EVIDENCE.

§ 62. Declaration, complaint, or petition.

§ 63.—Form and requisites in general.

§ 64.—Description of property.

§ 65.—Title, estate, and possession of plaintiff.

§ 68. Plea, answer, and disclaimer.

§ 69.—Form and requisites in general.

§ 80. Issues, proof, and variance.

§ 82.—Necessity of proof of title of all coplaintiffs.

§ 84.—Evidence admissible under pleadings.

§ 86. Presumptions and burden of proof.

§ 87. Admissibility of evidence.

§ 88.—In general.

§ 95.—Title and right to possession.

§ 96.—Possession and ouster.

IV. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT AND REVIEW.

§ 105. Mode and conduct of trial.

§ 110. Instructions.

§ 113. Judgment.

§ 114.—Form and requisites in general.

§ 117.—Operation and effect.

§ 118. Execution and enforcement of judgment.

§ 120.—Writ of possession.

V. DAMAGES, MESNE PROFITS, IMPROVEMENT AND TAXES.

§ 132. Measure of damages or profits.

Of limitation on right to sue, see Limitation of Actions, § 19.

Recovery for in action of trespass, see Trespass, § 16.

I. RIGHT OF ACTION AND DEFENSES.

§ 8. Title to support action.

§ 9.—In general.

A person seeking to recover real estate must do so, if at all, upon the strength of his own title.

Allen v. Smith, 8 Ky. Opin. 84.

To entitle plaintiff in ejectment to recover, he must connect himself with the commonwealth by an unbroken chain of paper title, or show title by adverse possession.

Poynter v. Harding, 6 Ky. Opin. 406.

The evidence was held not to show title in plaintiff.

Poynter v. Harding, 6 Ky. Opin. 406.

A party in an ejectment suit must recover, if at all, upon the strength of his own title, and can not do so upon the weakness of his adversary's title.

McDowell v. Wiseman, 1 Ky. Opin. 285.

If the defendant's position was that of an adverse holder and claimant of the ground, when plaintiff accepted the deed, the plaintiff could not maintain his action.

McLaughlan v. Howard, 5 Ky. Opin. 443.

In ejectment, the plaintiff can recover only on the strength of his own title.

Leffler v. Dunville, 7 Ky. Opin. 691.

In order to recover in ejectment, the plaintiff must rely on his own title to the land, and not the want of title in defendant.

Bennett v. Darlington, 7 Ky. Opin. 504.

One having color of title can not be ejected by a plaintiff who is himself without title, but who relies solely upon his former possession.

Bowling v. Shepherd, 9 Ky. Opin. 343.

§ 13.—Equitable title.

Where a title bond was issued 88 years before any real claim is made

under it, and where the holder is not in possession and has not been, his claim is too uncertain to recover the land from a descendant of the owner who has been holding the land adversely to all the world for a great period of time.

Allen v. Smith, 8 Ky. Opin. 84.

§ 19. Possession of defendant.

One who does not hold the legal title can not be constructively in the possession of real estate.

Hardman v. Barclay, 5 Ky. Opin. 491.

Where plaintiff in ejectment fails to show that defendant was in possession of any part of the land when the suit was brought, plaintiff is not entitled to any relief against defendant.

Dogget v. Blades & Shirley, 6 Ky. Opin. 360.

§ 22. Defenses.

The mere existence of a lien on real estate, if set up by one having a right to be heard, is no defense to the owner's claim to title, which can not be defeated, except by some one holding a superior claim.

Hill v. Anderson's Admr., 10 Ky. Opin. 676.

One can not recover in ejectment against one having an easement even though he may own the property over which an easement exists.

Smith v. Martin, 11 Ky. Opin. 818.

§ 24.—Adverse possession.

Where the defense is titled by adverse possession, an instruction "that the claim of possession must be to a well defined marked boundary," is erroneous as a natural boundary may exist and control in such a case.

Osborn v. Hereford, 6 Ky. Opin. 110.

§ 33. Persons entitled to sue.

Where a trustee has been invested with the legal title to real estate, the beneficiaries of the trust can not maintain an action of ejectment to recover the land, but they must resort to a court of equity to enforce their claims.

Melton v. Caigill, 8 Ky. Opin. 234.

II. JURISDICTION, PARTIES, PROCESS AND INCIDENTAL PROCEEDINGS.

§ 36. Jurisdiction of subject-matter.

Where land is sold under an execution, possession of the land must be recovered by an action at law prosecuted in the county where the land lies.

Buckman v. Clarkson's Admr., 4 Ky. Opin. 642.

§ 37. Jurisdiction of the person.

One can not be divested of title to real estate by an action in the nature of an ejectment without being a party to the action, and in the absence of any proof whatever, one can not by a pleading admit a fact for another not a party.

Whipple v. Louisville School Board, 13 Ky. Opin. 785.

§ 40. Parties plaintiff.

§ 41.—In general.

Where one who becomes the owner of real estate contracts to sell it on a bond for a deed, he can not thereafter, without the sale contract be in good faith rescinded, maintain an action for the possession of the land or a part of it for the benefit of the holder of the title bond, for he is thereby seeking to recover the land which he does not own and to the possession of which he is not entitled.

Hobson v. Hendrick, 13 Ky. Opin. 766.

§ 48. Notice to tenant and entry of consent rule.

Where appellee, mother of J., deceased, entered upon and took possession of a house and lot belonging to the estate under a parol agreement with the intestate before he died, that she was to have same as a home during her lifetime, in consideration of services rendered the intestate during his life; before appellee can be ejected, she is entitled to notice to surrender possession of the premises to the heirs of the intestate.

Jones v. Jones, 2 Ky. Opin. 214.

III. PLEADING AND EVIDENCE.

§ 62. Declaration, complaint, or petition.

The original petition was defective

in not distinctly stating who was in possession of the land sought to be recovered, and the alternative averment in the amendment, that the property was in the actual possession of the defendant or some tenant under her, is also defective.

Hardman v. Barclay, 5 Ky. Opin. 491.

Where a petition states that the plaintiff is the owner and entitled to the possession of the land, and after describing the land it then alleges that the larger portion thereof is the property of the plaintiff, thus contradicting the previous averment that he owned all of the land, it can not be determined from the petition what portion of the land belonged to the plaintiff.

Casteel v. Scaggs, 5 Ky. Opin. 185.

§ 63.—Form and requisites in general.

Even though defective, a petition in ejectment is sufficient to withstand a demurrer, when it alleges that the plaintiff is the owner of the land and is entitled to the possession.

Hensley v. Breeding, 13 Ky. Opin. 943.

§ 64.—Description of property.

A petition to recover real estate held to be fatally defective for failing to describe, even in general terms, the real estate sought to be recovered.

Womack v. Gardner, 6 Ky. Opin. 226.

§ 65.—Title, estate, and possession of plaintiff.

One who as plaintiff in an original action proceeds to recover real estate and quiet his title thereto against the heirs, their vendees and tenants claiming an interest in certain real estate, when finding before judgment that he himself is without title, can not by purchasing the claims of the heirs who are defendants and then amending his petition in his original action have his right of recovery in the name of the heirs or under their title against those who entered as tenants or purchasers under such heirs.

Gillespie v. Bradford, 11 Ky. Opin. 804.

§ 68. Plea, answer, and disclaimer.

Where appellant denies that appellee is the owner and entitled to the possession of the land described in the petition, and denies that he now holds, or ever held, possession of the land without right, and denies that he has for years unlawfully kept the plaintiff out of possession, the import of this language is not a denial of the simple fact that appellant was in possession of this land at the commencement of the action, but a denial that his possession was unlawful; since unless every allegation of the petition is specifically denied, it is taken as true for the purpose of the action, and it is not necessary to introduce proof on that point.

Todd v. Bacon, 5 Ky. Opin. 327.

§ 69.—Form and requisites in general.

Where an answer is not sufficient to escape a judgment for costs, but is evasive, neither denying plaintiff's title nor defendant's possession of the land, and simply denying that she "unlawfully holds possession of a lot belonging to the plaintiffs," it is not a denial that she was in possession in fact, but only that her possession is unlawful; nor does a denial that she "keeps plaintiff out of his rightful property," deny that she held the ground, nor that it was the property of the co-plaintiff; and the answer is not sufficient to escape a judgment for costs, but is an admission of title in the plaintiffs, and of her own possession.

Cunningham v. Collins, 2 Ky. Opin. 212.

§ 80. Issues, proof, and variance.

§ 82.—Necessity of proof of title of all coplaintiffs.

Before one can recover against a party in the possession of land he must show in himself a superior legal title.

Geer v. Winston, 1 Ky. Opin. 373.

A party in actual possession, holding under an unrecorded deed has a superior title to one claiming under a subsequent deed, which has been recorded.

Southard v. Page, 2 Ky. Opin. 401.

§ 84.—Evidence admissible under pleadings.

The books of the county assessor for a certain year are not admissible in evidence, without proof by the assessor who made the assessment list, that the party giving them in swore to them, that the assessor who took them is dead or absent from the state, and in either event proof should be made of the handwriting of the assessor.

Starkle v. Ogden, 7 Ky. Opin. 105.

§ 86. Presumptions and burden of proof.

Where in an action for partition the defendants answer denying plaintiffs' right to any interest in the land, and claiming the whole title in themselves, and the case was transferred to the circuit court, it assumed the character of an action for recovery of land, and the burden was on the defendants to show a superior title in themselves.

Younger v. Myerer & Field, 7 Ky. Opin. 560.

Where a deed under which the plaintiff claims title, in an action of ejectment, contains exceptions, the burden is on him to show that the land in controversy is not within the exceptions.

Todd v. Bacon, 5 Ky. Opin. 327.

Where a patent relied on for title to real estate contains an indefinite exclusion of acreage and the defendant has put in issue plaintiffs title, the burden rests on the plaintiff to show that the land which he claims is not within the acreage excluded; but when he has shown this and the defendant seeks shelter under an older patent which also contains an exclusion, the burden is thrown upon him to show that his claim is not within the exclusion in his own patent.

Harris v. Lavin, 13 Ky. Opin. 22.

One seeking to claim land in the possession of another who claims it under a survey, has the burden to show a superior claim either by virtue of a previous appropriation by entry or survey, or being an actual settler.

Boyd v. James, 13 Ky. Opin. 601.

In an action of ejectment, the burden is on the plaintiff to establish every fact necessary to be shown in order to recover. He recovers on the strength of his own right and not upon the weakness of his adversary.

Red River Iron Mfg. Co. v. Rainey, 13 Ky. Opin. 606.

§ 87. Admissibility of evidence.

§ 88.—In general.

In an action of ejectment, wills, powers of attorney, and title bonds are admissible as evidence for the purpose of showing that the party offering them claimed under those to whom the land in controversy was patented.

Fannin v. Smalldridge, 4 Ky. Opin. 194.

In order to recover under a sheriff's deed, the petition must show the execution, levy and deed of the sheriff, also the judgment upon which the execution issued; since the judgment and execution are the authority for selling, and must be exhibited to show that the party's right has been regularly deduced from the original claimant.

Chappell v. Sudduth, 5 Ky. Opin. 57.

In an action to recover land, it is not necessary for the plaintiff to show title back beyond the common source.

Hogg v. Thurman, 5 Ky. Opin. 555.

Where the actual location of the land in contest is the question involved, the general recitals in a deed should not be allowed to control the more minute description subsequently given.

Todd v. Bacon, 5 Ky. Opin. 327.

Where the land embraced in a deed lies in two counties, the deed may be read as evidence, in an action of ejectment, if it has been recorded in the county where the greater part of the land lies.

Todd v. Bacon, 5 Ky. Opin. 327.

Where in an ejectment suit, an attempt is made to trace the source of title back beyond the recollection of any except very aged persons, a more liberal rule exists as to the introduc-

tion of documents than where the occurrences are of a recent date.

Alexander v. Vandyke, 9 Ky. Opin. 747.

§ 95.—Title and right to possession.

Where the title and possession of land are both brought in question by reason of the alleged unlawful entry, the result of the litigation determines the question of title.

Chapman v. Shannan, 6 Ky. Opin. 30.

§ 96.—Possession and ouster.

Possession is evidence of title; however, it may be explained away by evidence, but in the absence of all other evidence the fact of a plaintiff in ejectment having been once possessed of the land will be sufficient, *prima facie*, to authorize a recovery against an intruder on that possession.

Bowling v. Shepherd, 9 Ky. Opin. 343.

Where proof of former possession in an ejectment suit establishes a *prima facie* right of recovery, it follows that plaintiff must recover unless the defendant can show a better title in himself or outstanding in another.

Bowling v. Shepherd, 9 Ky. Opin. 343.

IV. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT AND REVIEW.

§ 105. Mode and conduct of trial.

In an action of ejectment, where the defense pleaded is purely legal, there should be no transfer to the equity docket, but the cause should proceed to trial as an action at law.

Hatton v. Harman, 9 Ky. Opin. 394.

A suit in ejectment is a legal action and not one in chancery.

Nethercutt v. Bates, 9 Ky. Opin. 423.

§ 110. Instructions.

Whether certain land is embraced in a boundary recited in the evidence of title is a question for the jury, and the court should instruct that if the patents and deeds in the chain of title down to plaintiff included the land in controversy, the finding should be for

plaintiff, unless the defense of adverse possession is sustained by the proof.

Osborn v. Hereford, 6 Ky. Opin. 110.

Under a prayer of a petition for a judgment for land, and for \$300.00 for being kept out of possession of the land, an instruction that "If the jury find for the plaintiff they may also find for him in damages the reasonable rent of the land and extra costs of prosecuting this suit not exceeding \$400.00," is improper, as no extra cost can be allowed, the only costs allowable being that incidental to the suit.

Bailey's Heirs v. Cottle, 4 Ky. Opin. 566.

In an action for possession of land, an instruction that if the jury believe from the evidence that the appellants and those under whom they claim, had been in the continuous possession since 1819, of the land embraced in the deed to S, claiming to the boundary of said land, and that the land in controversy was included by said boundary, the law was for appellant, is erroneous, in that the converse of the proposition would be that if the possession had not been continuous since 1819, the law was not for appellants, and was misleading; but the jury should have been instructed that fifteen years' uninterrupted adverse possession of land gives a perfect right of entry, and would prevail in ejectment against an outstanding elder patent.

Sanders v. Ross, 4 Ky. Opin. 312.

An instruction "that if the jury believe from the evidence that at the date of the action begun, plaintiff was the owner of the land in controversy," is erroneous in that a question of law as to the ownership of the land was submitted; but the jury should have been instructed that if from the evidence they believed "certain facts existed" (enumerating them), the finding should be for the plaintiff.

Sallsberry v. Martin, 4 Ky. Opin. 122.

An instruction is erroneous which allows the jury to consider proof of waste in making up its assessment of damages, where there is nothing in the petition claiming damages, except

such as resulted from the detention of the lands, and no issue was raised as to waste.

Alexander v. Vandyke, 9 Ky. Opin. 747.

§ 113. Judgment.

Where the vendee of real estate brings an action in ejectment against another claimant for the land and the title is put in issue and judgment rendered for the defendant, the privity between the vendor and vendee is such as to make the action on the part of the vendee against these parties conclusive in an action in ejectment afterward instituted by the vendor against the same parties to recover the same land.

Montague v. Mahan, 10 Ky. Opin. 267.

§ 114.—Form and requisites in general.

Where, by the terms of the judgment, it is left for the clerk or sheriff to determine judicially what land is claimed in the petition for possession, such judgment is void for uncertainty; the determination of what land plaintiff was entitled to possession of, being for the court, and should be incorporated in the judgment.

Chamberlin v. Young, 8 Ky. Opin. 214.

§ 117.—Operation and effect.

Where the legal title to land in contest is in one not a plaintiff or defendant to the action, he can not be concluded nor his title passed by the pleadings, proof, or judgment to which he was not a party.

Heath v. Beckham, 2 Ky. Opin. 196.

A judgment in ejectment settles nothing but the right of the plaintiff to the possession of the premises at the time of the institution of the action.

Talbott's Admr. v. Dowd; McKenzie v. Dudley's Admr., 9 Ky. Opin. 139.

Where a judgment in ejectment was rendered in 1853 and a writ of possession issued therein in 1871, the issuance of such a writ was without legal vitality as against persons not parties to the ejectment suit, whose adverse

possession had ripened into perfect title, and the issuing of such a writ will not disturb their possession or title.

Talbott's Admr. v. Dowd; McKenzie v. Dudley's Admr., 9 Ky. Opin. 139.

§ 118. Execution and enforcement of judgment.

§ 120.—Writ of possession.

In ejectment, where recovery is had, plaintiff is entitled to a writ of possession, and may take possession under it, but in a suit in equity where the deeds under which both parties claim have no defined boundaries, the chancellors in determining the rights of the parties should fix and establish the boundaries, so as to enable the officer who executes the writ, as well as the parties, to know the boundaries of their respective tracts of land.

Chapman v. Shannan, 6 Ky. Opin. 30.

A writ directing the sheriff to place plaintiff in possession of a lot at N station on the east side of the railroad "10 poles in front to two rock corners, and running back 16 poles to two rock corners," neither one of the corners being located or identified, imposes on the sheriff the duty, not only to deliver possession, but to locate the property, and the latter duty can not be imposed on a ministerial officer.

Womack v. Gardner, 6 Ky. Opin. 226.

A writ of possession can only authorize the dispossessing of the parties to the suit, and has no effect on a stranger.

Ransdall v. Tristler, 1 Ky. Opin. 226.

Where the transcript on appeal does not show that any judgment was entered on a verdict giving plaintiff the right of possession of real estate, a writ of possession thereon is void and acts done under it amount to a trespass, and the occupant of such real estate is entitled to recover for such trespass.

Gore v. Bates, 9 Ky. Opin. 171.

Where the owner of real estate sues for its possession, to which he is entitled, the chancellor can not legally

withhold from him the writ of possession to await a report of a commissioner of the value of rents and improvements.

Barton v. Brown, 13 Ky. Opin. 570.

V. DAMAGES, MESNE PROFITS, IMPROVEMENTS AND TAXES.

§ 132. Measure of damages or profits. The assessment of the value of rents can not be done without proof.

Green v. Winston, 1 Ky. Opin. 347.

ELECTION.

Abandonment of motion for, see Trial, § 75.

As to defense, see Pleading, § 369.

Between causes of action set forth by petition, see Trial, § 2.

By tenant, see Landlord and Tenant, § 277.

Motion to require commonwealth to elect upon which count it will proceed, see Criminal Law, § 1162.

Of purchaser at judicial sale, see Judicial Sales, § 21.

To proceed against corporation or its officers, see Action, § 50.

To take under will or under law, see Wills, §§ 778, 780, 788, 791, 792, 796.

ELECTION OF REMEDIES.

§ 2. Causes of action and remedies subject to election.

§ 5. Necessity for election.

§ 7. Acts constituting election.

§ 2. Causes of action and remedies subject to election.

Where a contract for the sale of chattels is broken, the injured party may elect to sue for the contract price or for damages sustained by him by reason of the breach of contract.

Boone County Nat. Bank v. Clements, 9 Ky. Opin. 205.

§ 5. Necessity for election.

Refusal of plaintiff to elect upon which grounds he will stand, when required to do so by order of court, is good cause for dismissal.

Latham & Wilson v. Litsay, 7 Ky. Opin. 244.

§ 7. Acts constituting election.

The institution of an action upon contract before the filing of petition in bankruptcy by defendant, can not be regarded as an election by the plaintiff as to his remedies, where the other remedy was not at the time open to him.

Grimes v. Kinhead, 7 Ky. Opin. 611.

ELECTIONS.

III. ELECTION DISTRICTS OR PRECINCTS AND OFFICERS.

§ 48. Creation and alteration of districts or precincts.

§ 50. Appointment, qualification, and tenure of officers.

IV. QUALIFICATION OF VOTERS.

§ 71. Residence.

§ 87. Forfeiting of citizenship and disfranchisement.

§ 90. —Conviction of crime.

VIII. CONDUCT OF ELECTION.

§ 224. Rejection of vote by election officers.

§ 264. Certificates of election.

§ 280. Process or service of notice.

X. CONTESTS.

§ 290. Evidence.

§ 293. —Admissibility in general.

§ 306. Costs.

XI. VIOLATIONS OF ELECTION LAWS.

§ 313. Illegal voting.

Appeal from election contest board triable de novo, see Appeal, § 893.

Local option election, see Intoxicating Liquors, III.

Of municipal officers, see Municipal Corporations, § 128.

Reconsideration of election of school commissioner, see Schools and School Districts, § 63.

III. ELECTION DISTRICTS OR PRECINCTS AND OFFICERS.

§ 48. Creation and alteration of districts or precincts.

Where an order of the court fixed the boundary of a voting precinct in 1855, and such boundary is acquiesced in for many years, it is against public policy to declare the order void be-

cause there was no proper petition filed upon which to base the order.

Cruther v. Shelby R. R. Dist. of Shelby Co., 11 Ky. Opin. 404.

§ 50. Appointment, qualification, and tenure of officers.

Where an officer tenders his resignation before the time to hold an election, to take effect after said time, the office is not vacant, and no election to fill the office can be legally held.

Blount v. Anderson, 1 Ky. Opin. 62.

IV. QUALIFICATION OF VOTERS.

§ 71. Residence.

The place of "residence," of one claiming the right to vote, is the place where the family of a married man resides, unless such residence is for a temporary purpose only; and if the family is permanently at one place, and he transacts business at another, the former shall be his residence.

Waring v. Commonwealth, 4 Ky. Opin. 572.

§ 87. Forfeiting of citizenship and disfranchisement.

§ 90.—Conviction of crime.

Whether a citizen has been guilty of an offense involving the forfeiture of his right to vote is necessarily a judicial question which can be constitutionally decided by the judiciary on a full and fair trial on an indictment or a presentment, but can not be rightfully adjudged collaterally or incidentally by the officers of the election; nor can a test oath be constitutionally required in such case, nor the refusal to take it be deemed a judicial trial and conviction of the imputed offense.

Burkett v. McCarty, 1 Ky. Opin. 100.

VIII. CONDUCT OF ELECTION.

§ 224. Rejection of vote by election officers.

The constitutionality of a law enacted by the Legislature is a judicial question to be determined by the courts, and the judges of an election are not called upon to decide the question.

Doyle v. Beard, 4 Ky. Opin. 619.

§ 264. Certificates of election.

The board for examining the poll-books and giving certificates of election are not required to perform their duties only when legal elections are held.

Blount v. Anderson, 1 Ky. Opin. 62.

§ 280. Process or service of notice.

Where, in an election contest the defendant answers and goes to trial on the merits, it is thereafter too late for him to raise any question as to the want or sufficiency of a notice to contest.

Davis v. Gatliff, 13 Ky. Opin. 407.

X. CONTESTS.

§ 290. Evidence.

§ 293.—Admissibility in general.

Upon identification of one, who voted at a certain precinct, it is proper to permit the poll books to be read as evidence to the jury to show that his vote was recorded and counted.

Waring v. Commonwealth, 4 Ky. Opin. 572.

§ 306. Costs.

No judicial power is vested in the Legislature, and it can not therefore render a judgment for costs in a contest of election, but the Legislature or board may adjudge the costs against the unsuccessful party, and the statement, when certified, will authorize the circuit or county court to render judgment for the costs, the certificate being evidence only.

Culbertson v. Prichard, 9 Ky. Opin. 618.

XI. VIOLATIONS OF ELECTION LAWS.

§ 313. Illegal voting.

An indictment for illegal voting, which charges the holding of an election, the precinct in which accused voted, the candidate for whom he voted and that accused was not a resident of the state, was held sufficient.

Commonwealth v. Colbert, 7 Ky. Opin. 391.

EMANCIPATION.

See Slaves, § 23.

EMBEZZLEMENT.

§ 12. Embezzlement by particular classes of persons.

§ 14.—Agents.

§ 25. Indictment or information.

§ 26.—Requisites and sufficiency in general.

§ 45. Trial.

§ 49.—Verdict.

§ 12. Embezzlement by particular classes of persons.

§ 14.—Agents.

An employer's agent entrusted with the collection of his employer's accounts is not guilty of embezzlement under Gen. Stat. 1883, ch. 29, art. 12, § 2, who collects the accounts and fails upon demand to pay the proceeds to such employer; but where property or things which are the subjects of larceny are entrusted to a person to be delivered at a place or to a person to whom the property was to be delivered, and there is failure to do so, it will amount to embezzlement.

Commonwealth v. Bull, 12 Ky. Opin. 404.

§ 25. Indictment or information.

§ 26.—Requisites and sufficiency in general.

Under Gen. Stat. 1883, art. 12, ch. 29, § 2, an indictment is not good in charging embezzlement when it fails to allege that the money was delivered or entrusted to the accused to be delivered to a particular person at any place or to any person, and that he fraudulently converted or secreted it for that purpose.

Fairleigh v. Commonwealth, 12 Opin. 592.

General Stat. 1883, art. 12, ch. 29, § 1, applies to embezzlement from a corporation, and under such section the indictment to be good must allege by fact or inference that the company is an incorporated company.

Fairleigh v. Commonwealth, 12 Ky. Opin. 592.

To make an indictment good under Gen. Stat. 1883, ch. 29, art. 11, § 5, it must be charged that the accused wil-

fully misappropriated, misapplied, concealed and used the money of the state of Kentucky, of which he had the custody, control and possession, for his own use and purpose or the use of another with intent to deprive the commonwealth of the same.

Commonwealth v. Wilson, 13 Ky. Opin. 984.

§ 45. Trial.

§ 49.—Verdict.

A messenger charged with having embezzled one dollar entrusted to him for delivery to another, and convicted, can not be given greater punishment than that provided in cases of petit larceny, since an embezzler can not be punished as a felon unless the property embezzled is sufficient to amount to grand larceny if one was charged with its theft.

Commonwealth v. Hicks, 11 Ky. Opin. 891.

EMINENT DOMAIN.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

§ 6. Delegation of power.

§ 10.—To private corporation.

§ 16. Particular uses or purposes.

§ 20.—Railroads.

II. COMPENSATION.

(A) NECESSITY AND SUFFICIENCY IN GENERAL.

§ 73. Necessity of payment before taking.

§ 74.—In general.

(C) MEASURE AND AMOUNT.

§ 122. Necessity of just or full compensation or indemnity.

§ 135. Taking part of tract or property.

§ 136.—In general.

§ 139. Injuries to property not taken.

§ 144. Deduction or set-off of benefits.

§ 145.—In general.

§ 150. Inadequate or excessive compensation.

(D) PERSONS ENTITLED AND PAYMENT.

§ 151. Persons entitled.

§ 152.—In general.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

§ 172. Jurisdiction.

- § 213. Assessment by jury.
- § 225. Assessment by commissioners, appraisers, or viewers.
- § 226.—Application and proceedings thereon.
- § 250. Appeal.
- § 261.—Trial de novo.

Destroying building to arrest conflagration, see States, § 85.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

§ 6. Delegation of power.

§ 10.—To private corporation.

The Kentucky and Indiana Bridge Co., under its charter, has no power to appropriate land to be used in building a railroad to connect its bridge with other railroads, as such appropriation by condemnation can only be had by a railroad company; and under the general act of 1882, it follows that the Louisville Chancery Court has no jurisdiction of the petition filed by the Bridge Company.

Boone v. Kentucky & Indiana Bridge Co., 13 Ky. Opin. 981.

§ 16. Particular uses or purposes.

§ 20.—Railroads.

Where a railroad company entered upon plaintiff's land and proceeded to construct its roadbed thereon, without condemning the land as provided by law, the railroad company is liable to those in possession and holding a legal title, for the injury committed to the land, although the damages to the land may have been assessed and paid in the name of another person not in possession and not entitled thereto.

Elizabethtown, &c., R. Co. v. Foster, 7 Ky. Opin. 467.

II. COMPENSATION.

(A) NECESSITY AND SUFFICIENCY IN GENERAL.

§ 73. Necessity of payment before taking.

§ 74.—In general.

Private property can not be taken for a public use until just compensation has first been made.

Nashville & Chattanooga R. Co. v. Murphy, 6 Ky. Opin. 118.

Where damages are awarded to the owners of land taken for a highway, such damages must be tendered or paid into court before their land can be taken.

Baker v. Tandy, 8 Ky. Opin. 701.

(C) MEASURE AND AMOUNT.

§ 122. Necessity of just or full compensation or indemnity.

If land is taken for a public use, the damage must be ascertained by the jury, unless the right to assessment by a jury is waived by the owners agreeing to accept whatever the court may deem just.

Mitchell v. Baker, 7 Ky. Opin. 24.

§ 135. Taking part of tract or property.

§ 136.—In general.

In estimating damages for land taken, the defendants are entitled to be paid the value to them of the land taken, notwithstanding any enhancement in the value of those not taken, but the jury should be instructed that in estimating the value of the land taken, the enhanced value, if any, to the entire tract, should not be allowed to enter into their estimate at all.

Elizabethtown & Paducah R. Co. v. Klingensmiths, 4 Ky. Opin. 445.

As the owner of the land has the right to demand pay for that taken notwithstanding that the use to which it may be put, may greatly enhance the value of the remaining land, he can not be allowed to avail himself of this enhancement to increase the value of that for which the public is required to pay.

Elizabethtown &c. R. Co. v. Kurtz, 4 Ky. Opin. 71.

§ 139. Injuries to property not taken.

In an eminent domain proceeding for damages for taking property by a railroad company, no fact which does not certainly and absolutely have the effect of causing an immediate and definite depreciation of value shall be taken into consideration.

Elizabethtown &c. R. Co. v. Kurtz, 4 Ky. Opin. 71.

Since appellees are entitled to be paid the value of the land taken, not-

withstanding any enhancement in the value of those not taken, by reason of the construction of appellants' road, the jury should have been instructed, that in estimating the value of the land taken, the enhanced value, if any, to the entire tract should not be allowed to enter into their estimate at all.

Elizabethtown & Paducah Ry. Co.
v. Klinglesmiths, 5 Ky. Opin. 94.

§ 144. Deduction or set-off of benefits.

§ 145.—In general.

Speculative advantages or disadvantages, independent of the intrinsic value of the property from the improvements are a matter of set-off against each other, and do not affect the dry claim for the intrinsic value of the property taken.

Elizabethtown & c. R. Co. v. Kurtz,
4 Ky. Opin. 71.

Just compensation to the owner for taking his property for public use without his consent, means the actual value thereof in money, without any deduction for estimated profit, or the advantages accruing to the owner for the public use.

Elizabethtown & c. R. Co. v. Kurtz,
4 Ky. Opin. 71.

Damages occasioned, danger of fire, injuring of stock, inconvenience of hauling across the track, and discomfort of passing trains, are consequential, and are set-off by the provisions in the charter of a railroad company, providing "advantages to such residue of property to be derived from the building and operating of said road by, through or near such residue."

Elizabethtown & c. R. Co. v. Kurtz,
4 Ky. Opin. 71.

§ 150. Inadequate or excessive compensation.

Where R. assessed his land at about \$20.00 per acre, and the railroad company took three acres, and cut off about fifteen from the main land, a judgment in damages for \$464.00 is excessive.

Elizabethtown & Paducah R. Co.
v. Stickler, 4 Ky. Opin. 446.

Where the judgment is for more than the entire value of the land taken and the fifteen acres cut off

by the road, and exceeds the entire value according to the assessment made by appellee, the damages allowed are unreasonable and excessive.

Elizabethtown & Paducah Ry. Co.
v. Stickler, 5 Ky. Opin. 165.

(D) PERSONS ENTITLED AND PAYMENT.

§ 151. Persons entitled.

§ 152.—In general.

Where the owners of mill property agree that a third person may rebuild and repair a mill and reimburse himself out of the rents and use of the mill, and after it is rebuilt the state condemns it and takes it, the person rebuilding it is entitled to participate in the money due from the state on account of such condemnation.

Hazelrigg v. McGuire, 8 Ky. Opin.
74.

Where one has sold land to another, executing to him a title bond, the holder of such bond is the equitable owner of the land and is entitled to damages sustained by reason of the establishment of a highway over or through such land, and even a tenant may be awarded damages to the extent that he has sustained injury in such a case.

Grider v. Porter, 13 Ky. Opin. 532.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

§ 172. Jurisdiction.

The statute gives the county court exclusive original jurisdiction of proceedings by a railroad company to appropriate a right of way, and no other court can exercise any such original jurisdiction; since original jurisdiction can not be given by consent upon a court having only appellate jurisdiction.

Mississippi Cent. R. Co. v. Davis,
8 Ky. Opin. 524.

The statutes gives jurisdiction to the county court to hear exceptions filed to the award of commissioners in a proceeding by a railroad company to appropriate a right of way, and the transfer of such a cause to the common pleas court by consent or

both parties will not give probate jurisdiction to hear such cause.

Mississippi Cent. R. Co. v. Davis,
8 Ky. Opin. 524.

§ 213. Assessment by jury.

Where a person's property is being taken from him without his consent, to be used as a highway, he is not bound to refuse to accept a sum for his property upon pain of his silence being taken for his willingness that the court should act on a subject about which it could not act except by his consent, since under such circumstances he is entitled to have his damages fixed by jury.

Allen v. Wilcox, 10 Ky. Opin. 463.

§ 225. Assessment by commissioners, appraisers, or viewers.

§ 226.—Application and proceedings thereon.

The statute which declares that a writ of ad quod damnum shall be awarded "if desired by the proprietor, or if the court see cause for awarding the writ," means that where any legal cause exists for ordering the writ, it is the duty of the court to award it.

Allen v. Wilcox, 10 Ky. Opin. 463.

§ 250. Appeal.

§ 261.—Trial de novo.

Where an appeal is taken from the county court to the circuit court in a proceeding to condemn land for railroad purposes, the case on appeal is to be tried de novo, it being a special proceeding not governed by the law of appeals in other cases.

Chattaroi R. Co. v. Biggs. 13 Ky. Opin. 902.

ENTIRETY.

Tenants by, see Husband and Wife, § 16.

ENTRY.

Rights acquired by, see Public Lands, § 32.

Rights acquired by pre-emption, see Public Lands, § 34.

EQUITABLE ASSIGNMENTS.

See Assignments, § 73.

EQUITY.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(A) NATURE, GROUNDS, SUBJECTS AND EXTENT OF JURISDICTION IN GENERAL.

§ 1. Nature and source of jurisdiction.

§ 3. Grounds of jurisdiction in general.

§ 5. Mistake.

§ 6.—In general.

§ 7.—Of law.

§ 10. Fraud.

§ 11.—In general.

§ 15. Subjects of jurisdiction in general.

§ 23. Contracts in general.

§ 32. Jurisdiction of property or other subject-matter.

(B) REMEDY AT LAW AND MULTIPLICITY OF SUITS.

§ 45. Adequacy of legal remedy.

§ 46.—In general.

§ 51. Multiplicity of suits.

(C) PRINCIPLES AND MAXIMS OF EQUITY.

§ 54. Application and operation in general.

§ 60. Where equities are equal, the first in time will prevail.

§ 65. He who comes into equity must come with clean hands.

II. LACHES AND STALE DEMANDS.

§ 67. Nature and elements in general.

§ 68. Grounds and essentials of bar.

§ 71.—Lapse of time.

IV. PLEADING.

(A) ORIGINAL BILL.

§ 133. Premises or statement of cause of action.

V. EVIDENCE.

§ 346. Presumptions and burden of proof.

§ 347. Admissibility.

§ 348. Weight and sufficiency.

VI. TAKING AND FILING PROOFS.

§ 350. Time for taking.

§ 351. Examination of witnesses.

§ 353.—Cross-examination and re-examination.

VIII. HEARING, SUBMISSION OF ISSUES TO JURY, AND RE-HEARING.

§ 376. Submission of issues to jury.

§ 377.—In general.

§ 380.—Proceedings at trial.

IX. MASTERS AND COMMISSIONERS, AND PROCEEDINGS BEFORE THEM.

§ 395. Powers and functions in general.

§ 398. Liabilities on official bond.

§ 406. Report.

§ 407.—Form and sufficiency in general.

X. DECREE AND ENFORCEMENT THEREOF.

§ 415. Nature and essentials in general.

§ 422. Final decree.

§ 423. Nature and extent of relief in general.

§ 428. Entry and record.

§ 429. Amendment or modification.

See Alteration of Instruments; Cancellation of Instruments; Contribution; Conversion; Creditors' Suit; Discovery; Injunction; Quieting Title; Receivers; Reformation of Instruments; Specific Performance; Subrogation.

Alternative relief, see Injunction, § 194.
Complicated transactions, see Accounts, § 6.

Equitable accounting, see Accounts, § 17.

Equitable action to enforce judgment, see Judgment, § 854.

Equitable estoppel, see Estoppel, III.

Equitable interests attachable, see Attachment, § 58.

Equitable interests subject to execution, see Execution, § 40.

Equitable liens, see Liens, §§ 7, 8.

Equitable relief against judgment, see Judgment, X.

Equitable set-off, see Set-off and Counterclaim, § 8.

Recovery of property fraudulently conveyed, see Fraudulent Conveyances, § 225.

Suit for partition, see Partition, II.

Suit to rescind contract for sale of land, see Action, § 21.

Trying questions of fact by jury, see Action, § 21.

Vendee's lien, see Vendor and Purchaser, § 337.

I. JURISDICTION, PRINCIPLES AND MAXIMS.

(A) NATURE, GROUNDS, SUBJECTS AND EXTENT OF JURISDICTION IN GENERAL.

§ 1. Nature and source of jurisdiction.

Where issues have been formed between litigants, in which one is charged with trespass by removing a gate, and the issues have been determined on appeal, a chancellor has no power to modify the judgment rendered by the court of law.

Thomas v. Clark, 10 Ky. Opin. 805.

§ 3. Grounds of jurisdiction in general.

Where persons with full knowledge of their rights accepted less than they had a right to demand, or adopted the construction placed upon the charter by the company, upon which the demand was made, they can not obtain relief in a court of equity.

Louisville & N. R. Co. v. Keyer, 7 Ky. Opin. 50.

Where one whose name had been forged to a bill, exercises his advantage to procure from the wife of the forger the pledge of her property for his indemnity on the forged obligation, by threatening prosecution of the husband, the creditor can not receive the assistance of a court of equity in enforcing the mortgage against the wife's property.

Werne & Pope v. Henisohn, 6 Ky. Opin. 446.

A creditor who has reduced his claim to judgment in a court of law, before he can proceed in equity to subject equitable interests, must have execution on his judgment and a return of no property found.

Hagan v. Kentucky Mut. Life Ins. Co., 9 Ky. Opin. 782.

A person having an interest in property, not denied by any one, has no right to come into a court of equity to have the extent of his interest in and power of the estate defended by judgment, and in such a case the court has no jurisdiction to enter judgment.

Bell v. Bell, 9 Ky. Opin. 801.

While a court of equity will favor the prevention of litigation by sustaining settlements made for that purpose, it will also aid the ignorant and weak against the efforts of superior minds, where improper advantage has been taken of those unable to protect themselves as to property rights.

Johnson v. Corbett, 12 Ky. Opin. 202.

§ 5. Mistake.

§ 6.—In general.

Where a suit is brought on a note, and the defense is made on the ground of mistake in its execution, the defendant should move to have the cause transferred to the equity docket.

Saloman v. Jones, 8 Ky. Opin. 132.

Where the defense is made in a suit on a note, that there was a mistake in its execution, and the defendant fails to have the cause transferred to the equity docket, he waives his right to have the cause tried as an equity cause.

Saloman v. Jones, 8 Ky. Opin. 132.

It is not improper, upon the application of a sheriff, sued by the county for settlement, to refer the action to the equity court on account of the existence of mistakes in his previous settlements and a desire to correct them; still where in a law court the whole matter is referred to a commissioner to hear evidence as to the state of the account, and evidence is heard and a report duly made, such defendant is not harmed by the failure of the trial court to refer the case to equity, to such extent as to require a reversal by this court.

Mullins v. Pendleton County Court, 13 Ky. Opin. 273.

§ 7.—Of law.

A mistake of law will not relieve against a contract founded upon a valuable consideration.

First National Bank of Franklin v. Ford & Bros., 10 Ky. Opin. 251.

§ 10. Fraud.

§ 11.—In general.

Buying in of one's debts with his own money, at a discount from his creditors, they believing him insolvent when he was solvent, is a fraud on

them, and a sufficient legal reason why no court would assist him to procure the profits thus made by his own fraudulent act.

Grissman v. Smith, 1 Ky. Opin. 303.

Where one participates in another's fraud, the law will not afford him relief on that ground; since equity in such a case leaves the parties where it finds them.

Magee v. Phelps, 11 Ky. Opin. 869.

§ 15. Subjects of jurisdiction in general.

Confusion of boundary is a well established head of equity jurisdiction, but it is not every dispute as to boundary that confers jurisdiction on courts of equity; since it is necessary that there should be some peculiar equity in the cause itself.

Nethercutt v. Bates, 9 Ky. Opin. 423.

After litigation lasting for some years and after more than one appeal to the Court of Appeals, it can not be contended for the first time that the chancellor had no jurisdiction because the circuit judge alone had transferred the case without the concurrence of the chancellor; besides where it is shown that such a transfer was made and the chancellor took jurisdiction without any objection and has been rendering judgments therein for years, the transfer was legal and the judgment valid.

Wrightson v. Cline, 12 Ky. Opin. 186.

§ 23. Contracts in general.

The only proper mode of selling land to satisfy a charge of a legacy is by a suit in equity, where the will gives the executor no powers to sell the land.

Huston v. Dorsey, 1 Ky. Opin. 217.

§ 32. Jurisdiction of property or other subject-matter.

The Louisville Chancery Court has no jurisdiction nor power to issue an execution addressed to the marshal of that court to levy on and sell property outside of Jefferson county to satisfy a judgment of said court, as the court's jurisdiction extends only over

said county, and a levy and sale of property by the marshal under an execution, located in another county, is void.

Craddock v. Jordan, 11 Ky. Opin. 146.

(B) REMEDY AT LAW AND MULTIPLICITY OF SUITS.

§ 45. Adequacy of legal remedy.

§ 46.—In general.

Where the remedy at law is plain, adequate and complete, and no exceptional facts are exhibited by the petition which would justify equitable relief, the chancellor will not interfere with the general statutory mode of condemnation.

Dulaney v. National Tpk. Rd. Co., 12 Ky. Opin. 397.

Equity will not entertain an action to enforce a right where the party has an ample remedy at law; and the fact that such a party has allowed the time to pass for taking an appeal, or failed to file his motion in time to get a new trial, his own laches having caused the injury, affords no reason for appealing to a court of equity.

Hieronymous v. Chenowith, 13 Ky. Opin. 938.

§ 51. Multiplicity of suits.

In a suit by parties to recover the amount paid by them for lottery tickets issued and sold to them and a large number of other persons whose names alleged by plaintiffs to be unknown to them, the total sum due to all of such purchasers can not be alleged so as to raise the amount to give the court jurisdiction, as the purchase is a separate and distinct transaction, and when the sum for which plaintiffs ask for judgment is only \$3, the Louisville chancery court has no jurisdiction.

McCarty v. Tatum, 11 Ky. Opin. 633.

(C) PRINCIPLES AND MAXIMS OF EQUITY.

§ 54. Application and operation in general.

A court of equity will not compel the payment of money and a commis-

sion for collecting the sum, where the money would have to be paid back as soon as collected, since it would be compelling a useless thing.

Crenshaw v. Jarvis, 6 Ky. Opin. 268.

§ 60. Where equities are equal, the first in time will prevail.

In a contest between mere equities, the senior equity must prevail over the junior equity.

Thomas v. Smith, 13 Ky. Opin. 392.

§ 65. He who comes into equity must come with clean hands.

A court of equity will not grant relief to one who does not come into equity with clean hands.

Curry v. Privett, 6 Ky. Opin. 372.

Equity will not relieve a debtor from the payment of debts purchased by his agent, where he has participated in the fraud committed on his creditors by his agent.

Larkin v. Millit, 2 Ky. Opin. 26.

II. LACHES AND STALE DEMANDS.

§ 67. Nature and elements in general.

An answer filed to an attachment suit three months after service of process, and the cause submitted in six months does not constitute laches.

Coleman v. Ross, 4 Ky. Opin. 28.

§ 68. Grounds and essentials of bar.

§ 71.—Lapse of time.

It is too late after the lapse of many years and after the death of a party with whom business transactions were had, to litigate the question with deceased's personal representative as to certain credits.

Rentlinger v. Davies' Admr., 6 Ky. Opin. 126.

The doctrine that courts of equity will not ordinarily regard time as the essence of a contract for the sale of land, was held to apply to the case at bar.

Lester v. Winfrey, 6 Ky. Opin. 121.

IV. PLEADING.

(A) ORIGINAL BILL.

§ 133. Premises or statement of cause of action.

Where a creditor comes into equity to enforce the collection of a debt, he must allege that he has recovered a judgment in personam against the defendant whose property he seeks to attach, that the judgment is unpaid, that he has caused execution to issue on his judgment directed to the county where the judgment was rendered or in which the defendant resides, that the execution was placed in the hands of the proper officer while in force, and that it had been returned by the officer indorsed, in substance, no property found.

Adkins v. Meadows, 9 Ky. Opin. 124.

V. EVIDENCE.

§ 346. Presumptions and burden of proof.

One seeking relief in a court of equity has the burden of showing the existence of every fact necessary to warrant a recovery.

Wilson v. Sanders' Exr., 11 Ky. Opin. 863.

§ 347. Admissibility.

The statute, providing that no person shall testify for himself in an equitable action, after taking other testimony for himself in chief, is not violated so as to prevent such person from testifying where he has taken the depositions of other witnesses before giving his own, but withdraws the depositions taken before his own and does not offer such depositions in evidence.

Hendricks v. Garrett, 10 Ky. Opin. 547.

§ 348. Weight and sufficiency.

The facts were held to authorize the chancellor to interfere with the application of money collected on notes to the payment of a judgment.

Morris v. Jones, 6 Ky. Opin. 405.

VI. TAKING AND FILING PROOFS.

§ 350. Time for taking.

The facts were held to warrant the extension of the time for the taking of testimony by defendant before a commissioner in chancery.

Crawford v. Voorheis, 6 Ky. Opin. 619.

§ 351. Examination of witnesses.

§ 353.—Cross-examination and re-examination.

Where a party had opportunity to cross-examine the witnesses before a master in chancery, and to introduce any witness whom he desired to examine, he can not be held to have been prejudiced by failure to give him notice of the taking of the testimony in the first instance.

Knight v. Turner, 6 Ky. Opin. 593.

VIII. HEARING, SUBMISSION OF ISSUES TO JURY, AND RE-HEARING.

§ 376. Submission of issues to jury.

§ 377.—In general.

In equitable proceedings, or in actions pending on the equity docket, by consent of the parties, the issues of fact are triable by the court, subject to the power of the chancellor to order issues of fact to be tried by a jury.

Maloney v. St. Louis Mut. Ins. Co., 6 Ky. Opin. 495.

In equitable proceedings and in actions pending in equity, the court is not bound, on motion of one of the parties, to submit issues of fact to a jury.

Maloney v. St. Louis Mut. Ins. Co., 6 Ky. Opin. 495.

§ 380.—Proceedings at trial.

Where an issue in a case in equity is submitted to a jury by the chancellor, it is immaterial whether the instructions given the jury were proper or not, since the chancellor has the right to disregard the verdict in rendering the judgment.

Yance's Admr. v. Foreman, 7 Ky. Opin. 158.

IX. MASTERS AND COMMISSIONERS AND PROCEEDINGS BEFORE THEM.

§ 395. Powers and functions in general.

A master commissioner has no right to act upon anything appearing in the record of another case which is not introduced as evidence and made an exhibit of the record.

Dugan v. Griffith, 7 Ky. Opin. 651.

The duties of the commissioner and receiver of the Louisville chancery court are somewhat different from that of similar officers throughout the state, by reason of the rules and regulations of that court adopted in accordance with the provisions of the Code of Practice.

Ewing v. Burns, Admr.; Burns v. Smith, 6 Ky. Opin. 647.

§ 398. Liabilities on official bond.

Where by the negligence of the commissioner and receiver of the Louisville chancery court, the court without knowledge of a deposit and of the case to which the money belonged, improperly paid it out to other creditors of the court fund, the sureties on the commissioner's bond are liable for the loss.

Ewing v. Burns, Admr.; Burns v. Smith, 6 Ky. Opin. 647.

§ 406. Report.

§ 407.—Form and sufficiency in general.

After a sale has been reported to and confirmed by the chancellor, he has no power, at a subsequent term, to hear exceptions or to permit, without consent, the commissioner to amend his report.

Lobrason & Hielburn v. Mullins, 10 Ky. Opin. 194.

X. DECREE AND ENFORCEMENT THEREOF.

§ 415. Nature and essentials in general.

The mere recital in a decree in equity that the case was heard upon the pleadings, proof and exhibits, is no evidence that parol testimony was introduced and heard in the case.

McCullom v. Cochran, 6 Ky. Opin. 111.

A matter being properly in the equity court, it is error to render a personal judgment, since the parties have a right to full and complete relief at the hands of the chancellor.

Gault v. Thompson, 6 Ky. Opin. 287.

§ 422. Final decree.

A judgment in chancery is final and enforceable from the beginning, and will not be suspended by a suggestion to the chancellor that it would be proper for him to exercise his power to set it aside during the term.

Gill v. Turner, 9 Ky. Opin. 880.

§ 423. Nature and extent of relief in general.

The chancellor is cautious in making an adjudication by which written evidence of business transactions are materially changed, and will only do so where the evidence is so clear and satisfactory as to leave but little room to doubt the propriety of exercising this equitable jurisdiction.

Rentlinger v. Davies's Admr., 6 Ky. Opin. 126.

The chancellor is not authorized to increase the claim of the creditor against the debtor by allowing two per cent. on the aggregate sum due.

Wellman v. Holtons Admx., 9 Ky. Opin. 576.

§ 428. Entry and record.

No judgment can be entered in equity against parties until after summons has been executed upon the time required by law, and in the absence of notice or voluntary appearance the court has no jurisdiction over such parties.

Ellis v. Johnson, 11 Ky. Opin. 868.

§ 429. Amendment or modification.

The chancellor, on a proper issue made for the purpose upon facts established, may correct a decree of a former term wrongfully entered through mistake or fraud.

Rudwig v. Crum, 8 Ky. Opin. 192.

ERROR.

Harmless Error, see Appeal, XVI, H; Criminal Law, § 1161-1177.

Persons entitled to allege, see Appeal, § 880.

ESCAPE.

Liability of officer for escape of prisoner, see *Sheriffs and Constables*, § 104.

§ 9. Indictment or information.

To be good, an indictment against a jailer for wilfully and negligently suffering a prisoner charged with murder to escape and go at large, must allege the nature of the commitment and the manner in which the prisoner was confined, and the averment that such prisoner was lawfully committed in the jail is not an allegation of fact, but the conclusion of the pleader, and is not sufficient.

Staton v. Commonwealth, 11 Ky. Opin. 374.

ESCROWS.

§ 3. Depositaries.

A note or bond can not be delivered by the obligor to the obligee as an escrow.

Murphy v. Hubble, 1 Ky. Opin. 146.

ESTATES.

§ 1. Nature and incidents in general.

§ 5. Fee simple.

See *Curtsey*; *Deeds*, III, C; *Life Estates*; *Remainders*; *Wills*, § 350.

By entirety, see *Husband and Wife*, § 16.

Conditional limitations, see *Deeds*, § 134.

Contingent estates or interests, see *Wills*, § 630.

Defeasible fee, see *Wills*, § 602.

Dual estates in same land, see *Deeds*, § 120.

Estates and interests created by will, see *Wills*, § 596.

Leasehold estates, see *Landlord and Tenant*.

Separate estate of wife, see *Husband and Wife*, § 110.

§ 1. Nature and incidents in general.

An estate for years in land is regarded in law as inferior to an estate for life, or an inheritance, since it is

only a chattel and becomes a part of the personal estate of the lessee.

Wilgus v. Commonwealth, 3 Ky. Opin. 448.

§ 5. Fee simple.

In a conveyance to the mother of a grantor during her natural life, and after the death of the mother the whole of the property to go to grantor's wife and the children, if there should be any living at the time of the death of the mother, the wife, although she had no children on the happening of the event, takes a fee simple title to the property; but when the conveyance provides that "if she should die leaving no children of the marriage, then the property to go to the right heirs of the undersigned, after the death of the undersigned," means not that such title should pass to his right heirs if the wife survived him, but that it should so pass after his death in the event he survived his wife.

Smart v. Montcalm, 11 Ky. Opin. 93.

ESTATES TAIL.

See *Wills*, § 604.

Converted into fee simple estates, see *Descent and Distribution*, § 73.

Admissions of remote vendor, see *Vendor and Purchaser*, § 239.

ESTOPPEL.

I. BY RECORD.

§ 1. Nature and elements.

§ 2. Judicial records in general.

§ 3. Pleadings.

§ 5. Stipulations and admissions.

§ 7. Verdicts and findings.

§ 9. Persons estopped.

§ 10. Matters precluded.

II. BY DEED.

(A) CREATION AND OPERATION IN GENERAL.

§ 13. Instruments operating as estoppel.

§ 15.—Deeds.

§ 26. Persons estopped in general.

§ 27. Grantors or mortgagors and privies.

§ 29. Grantees or mortgagees.

(B) ESTATES AND RIGHTS SUBSEQUENTLY ACQUIRED.

- § 35. Estoppel as to title subsequently acquired in general.
- § 46. Estates or rights affected.
- § 47.—In general.

III. EQUITABLE ESTOPPEL.**(A) NATURE AND ESSENTIALS IN GENERAL.**

- § 54. Knowledge of facts.
- § 55. Reliance of adverse party.
- § 62. Estoppel against public, government, or public officers.

(B) GROUNDS OF ESTOPPEL.

- § 63. Inconsistency of conduct and claims in general.
- § 65. Assertion of title or right in general.
- § 68. Claim or position in judicial proceedings.
- § 70. Failure to assert title or right.
- § 71. Disclaimer.
- § 72. Acts making injury possible as between actor and another equally blameless.
- § 73. Clothing another with apparent title or authority.
- § 74.—Real property.
- § 78. Contracts.
- § 82. Representations.
- § 86.—Validity of bills or notes.
- § 89. Acquiescence.
- § 90.—Assent to or ratification of acts of others in general.
- § 91.—Assent to or participation in judicial proceedings.
- § 93.—Permitting improvements or expenditures.
- § 94.—Permitting sale or mortgage of property.
- § 95. Silence.
- § 96. Negligence.

(C) PERSONS AFFECTED.

- § 98. Persons estopped.

(D) MATTERS PRECLUDED.

- § 101. Title or claim to property.

(E) PLEADING, EVIDENCE, TRIAL, AND REVIEW.

- § 109. Pleading as defense.
- § 117. Admissibility of evidence.
- § 118. Weight and sufficiency of evidence.

As to boundary line, see Boundaries, § 49.

By deed, see Infants, § 29.

Equitable estoppel, see Wills, § 792.

Of administrator who has wrongfully taken possession of deceased's real estate, see Executors and Administrators, § 323.

Of county to defend suit on bonds, see Counties, § 183.

Of defendant to object to petition on oral contract, see Pleading, § 236.

Of grantor, see Vendor and Purchaser, § 5.

Of guardian to deny interest of ward in land, see Guardian and Ward, § 94.

Of heirs to recover land sold under execution, see Execution, § 322.

Of infant, see Infants, § 55.

Of life tenant as against creditors of remaindermen for improvement, see Improvements, § 1.

Of married woman as against vendee of real estate, see Husband and Wife, § 129.

Of partner, see Partnership, § 24.

Of party to partition suit, see Partition, §§ 113, 115.

Of person held out as partner, see Partnership, § 33.

Of purchaser of property from corporation, see Corporations, § 446.

Of sureties on attachment bond, see Attachment, § 336.

Of tenant to deny landlord's title, see Landlord and Tenant, § 63.

Of wife as to husband's creditors, see Husband and Wife, § 198.

Of wife as to sale of trust property by husband, see Husband and Wife, § 129.

Of wife to attack sale on order of court, see Husband and Wife, § 198.

Of widow to claim dower, see Dower, § 72.

Purchaser to deny vendor's title, see Vendor and Purchaser, § 189.

To allege error, see Appeal, § 881.

To assert dower right, see Dower, §§ 46, 50.

To attack validity of mortgage, see Mortgages, § 83.

To complain of conveyance, see Deeds, § 111.

To complain of irregularity of service of process on infants, see Infants, § 89.

To complain of judgment by default, see Judgment, § 114.

To deny consideration, see Bills and Notes, § 98.

To deny corporate existence, see Corporations, § 34.

To deny dissolution of partnership, see Partnership, § 292.

To deny liability for improvement, see Municipal Corporations, § 319.

To have action dismissed, see Dismissal and Nonsuit, § 13.

To have sale of lands under attachment set aside, see Attachment, § 355.

To impeach original consideration of note, see Bills and Notes, § 98.

To object to jurisdiction, see Venue, § 84.

To object to street improvement, see Municipal Corporations, § 318.

To plead statute of fraud, see Vendor and Purchaser, § 225.

To question fiduciary character of administrator, see Executors and Administrators, § 455.

To set up dower right, see Dower, § 50.

I. BY RECORD.

§ 1. Nature and elements.

A purchaser of personal property in which there is a remainder life interest to others, known to him at the time, though the sale be absolute in form with general warranty, is estopped from denying liability on a note given for the purchase price, his purchase of the life estate being held to be a binding consideration.

Hull v. Bassett, 2 Ky. Opin. 596.

§ 2. Judicial records in general.

Where plaintiffs had execution levied on the land in controversy, in their favor, and had it sold as the property of the defendants or either of them, and received the proceeds of the sale, or where the sale was made with plaintiffs' knowledge, and they got the proceeds of the sale, they are

estopped to deny the title of the defendants to the land.

Poplar Mountain Coal Co. v. Dick, 7 Ky. Opin. 420.

Where the record fails to show that the confirmation of a sale, made on the same day the report was filed by the commissioner, was done at the request of the purchaser, the mortgagor, for whose accommodation the sale had previously been delayed, by his failure to except to the report, is estopped to complain of the confirmation at a later date.

Cox's Exr. v. Swigert, 3 Ky. Opin. 56.

Where, in an action on a bond under a distress warrant, it is recited that C is the plaintiff in the distress warrant and that the bondsmen undertook to pay him the value of the property and ten per cent. thereon, not exceeding the amount of the rent due, it operates as an estoppel to deny that C is not the plaintiff in the warrant.

Henning & Speed v. Muldoon & Co., 7 Ky. Opin. 277.

Where, in an action to quiet title, a title is held good, the parties to the action and those claiming under or through them can not thereafter recover on a fraudulent warranty or maintain an action therefor.

Jackman v. Gartin, 12 Ky. Opin. 159.

§ 3. Pleadings.

An answer of defendant in another action can not operate as an estoppel against him, where it does not appear that the answer induced plaintiff to change his position or to surrender or release any claim or right that he then asserted or held.

Turley v. Couchman's Admr., 7 Ky. Opin. 54.

§ 5. Stipulations and admissions.

Statements made by defendant in an action by another plaintiff were held not to operate as an estoppel against the defendant in the latter suit, but that they were mere admissions calling for a satisfactory explanation by him.

Turley v. Couchman's Admr., 7 Ky. Opin. 88.

§ 7. Verdicts and findings.

Where an action to recover land is determined in favor of the plaintiff, who afterwards institutes a suit for mesne profits, the defendant will not be allowed to dispute the right of the plaintiff to recover such mesne profits after the day of the denial laid in the declaration, and the recovery of the real estate will estop the defendant from denying plaintiff's right to rent.

Drabell v. Small, 9 Ky. Opin. 200.

§ 9. Persons estopped.

One is not estopped by a matter of record in a contest with a stranger who did not act upon admissions contained in such record.

Turley v. Couchman's Admr., 7 Ky. Opin. 88.

§ 10. Matters precluded.

The negligent failure to seek relief from a sale of land by a sheriff until his vendee has sold the property, and the legal title having been conveyed to an innocent purchaser without notice, will operate as an estoppel.

Feherenback v. Strauss, 2 Ky. Opin. 48.

A purchaser of land at a commissioner's sale, which was sold as containing 40 or 50 acres, more or less, is estopped from seeking relief from his purchase on the ground that there was only 36 acres in the tract; since having purchased the tract in gross and with knowledge of all the facts, he took upon himself voluntarily the risk as to the quantity.

Sowder v. Payne's Heirs, 2 Ky. Opin. 199.

II. BY DEED.**(A) CREATION AND OPERATION IN GENERAL.****§ 13. Instruments operating as estoppel.****§ 15.—Deeds.**

Where one has united with others in a conveyance, he is bound by and estopped to deny the recitals of the deed, and the estoppel runs with the land.

Cissel v. Rapier, 11 Ky. Opin. 553.

§ 26..Persons estopped in general.

A corporation is as much bound by an estoppel as an individual; and, where a county has voted to subscribe a large amount of stock to a railroad company, and such stock has been subscribed by the county judge, but bonds of the county have not been issued, and it is made to appear to the chancellor that the company is insolvent, its enterprise a failure, and that it is unable to complete the road such a distance as would inure to the benefit of the people of the county making such subscription, an injunction will issue to prevent the issuance of the bonds of the county; but the chancellor should have reserved the right to permit the issuing of the bonds whenever it is made to appear that there is a reasonable probability of the money being raised to complete the road.

Cumberland & O. R. Co. v. Washington County Court, 9 Ky. Opin. 668.

§ 27. Grantors or mortgagors and privies.

Where a mother sold land held in common with her sons, and received the consideration therefor, and the only object in having a son sign the deed being to strengthen the warranty of title, the fact that the son was one of the grantors does not estop him from showing that he received no part of the consideration.

Moore et al. v. Cleveland's Admr., 6 Ky. Opin. 588.

§ 29. Grantees or mortgagees.

Where A solicited B to buy C's land, and B authorized A to make the purchase for B, and C, not being acquainted with B, required A to execute his notes for the land, and C executed his title bond to A, and B took possession of the land, claimed, cultivated, and paid taxes on it for nine years with A's approval, and B, having paid A back all the purchase money except \$25, and with A's knowledge and consent, sold the land to D and executed to him his title bond, agreeing to convey the legal title to D upon payment of the purchase money, and D agreed with A to pay him the \$25 claimed by A to be due him on the original purchase price; and after this A, by

actual or ostensible sale, assigned to E his bond for title from B, E at the time being in full possession of the above facts, and thereupon C conveyed the legal title to E, and D sues E for the legal title, A's participation in B's sale to C estopped him, in equity, from claiming the land as his own, and his subsequent assertion of an adverse title and sale of it to E was, therefore, fraudulent and void as to D.

McBain v. Turpin, 1 Ky. Opin. 142.

(B) ESTATES AND RIGHTS SUBSEQUENTLY ACQUIRED.

§ 35. Estoppel as to title subsequently acquired in general.

The grantor warranting title is estopped from setting up an after-acquired title, but may avoid the estoppel by showing that since the execution of his covenant of warranty he has reacquired from his grantee the identical title he conveyed to him; and this he may do through a conveyance, or by any other legal mode of acquiring the title, as by fifteen years' continuous adverse possession.

Jones v. Stewart, 10 Ky. Opin. 304.

A covenantor is generally estopped from setting up an after-acquired title against his grantee or those claiming under him.

Jones v. Stewart, 10 Ky. Opin. 304.

§ 46. Estates or rights affected.

One who secures and holds possession of land under a parol contract to purchase, while so in possession is estopped to deny the title of one who thus contracts to sell to him and can not set up a title acquired by him while so in possession.

Bortman v. Giles, 8 Ky. Opin. 770.

§ 47.—In general.

One buying possession from a mere squatter, who has no claim of title, is not estopped from disputing the title of his grantor, where such purchaser bases his title upon some other fact.

Ratcliff v. Iron Hill Furnace & Min. Co., 9 Ky. Opin. 345.

When a party in possession claiming land as his own buys or recognizes an

outstanding title, he will not be estopped to set up the title under which he entered against the other, unless he has abandoned his possession under the title under which he entered.

Field's Heirs v. Klete, 10 Ky. Opin. 360.

III. EQUITABLE ESTOPPEL.

(A) NATURE AND ESSENTIALS IN GENERAL.

§ 54. Knowledge of facts.

The doctrine of estoppel does not apply where one's property is sold under a void execution and purchased by the party who is himself in the wrong, and who must have known, when he purchased, that the surety was no longer bound.

Bell v. Cross, 7 Ky. Opin. 523.

Where the purchaser of real estate executes notes and accepts a title bond, and afterwards voluntarily accepts a deed of conveyance of the land and makes no claim of a deficiency of acreage, and then sells and conveys the land, he is not in a position to resist recovery on his notes given for the purchase of the land on the ground that his grantor sold and bound himself by the title bond to convey a greater quantity than was afterwards found to be inside the boundary of the tract.

McGuire v. Pieratt, 13 Ky. Opin. 1039.

§ 55. Reliance on adverse party.

Where the conduct of the appellant was such as to induce appellee to believe that appellant was a principal in a note, and not surety, he is estopped to plead the statute of limitation of seven years.

McElroy v. Dunn, 5 Ky. Opin. 112.

§ 62. Estoppel against public, government, or public officers.

The state which has taxed national banks under the act of March 16, 1867, and received the tax and issued its quietus therefor can not be heard to allege that the act is unconstitutional.

Commonwealth v. Covington National Bank, 13 Ky. Opin. 536.

(B) GROUNDS OF ESTOPPEL.**§ 63. Inconsistency of conduct and claims in general.**

Where plaintiff's attorney bids in real estate at a sale to satisfy a judgment taken for his client, without being authorized so to do, and the client, upon being notified of such sale, disapproved of it, but waited three years before instituting suit to set it aside, in the meantime collecting his judgment in excess of the attorney's bid, these facts will not estop him from maintaining such suit.

Lashley v. Lackey's Admr., 12 Ky. Opin. 78.

One can not both claim under and against a will.

Morton v. Daugherty's Exr., 12 Ky. Opin. 116.

The facts that a bank through its board of directors appoints a committee whose duty it was to examine into the affairs of the bank, and whether or not the bank was in a solvent condition, and that this committee reported the condition of the bank all right, do not work an estoppel against the bank in the attempt to make the cashier liable for a neglect of duty.

Pepper v. Planters' Nat. Bank of Louisville, 12 Ky. Opin. 219.

§ 65. Assertion of title or right in general.

Where there were two funds out of which appellants could have made their claim, and but one out of which appellee could be compensated, and appellant to mislead appellee asserted a claim, which he did not enforce, to the fund upon which appellee had no lien, the appellant is held to be estopped to claim preference over appellee as to the other fund.

Maddox v. Austin, 12 Ky. Opin. 234.

§ 68. Claim or position in judicial proceedings.

The appellant, by his default, in an action on a note, admitted the allegation that he had received, by his marriage with the principal obligor, more than the debt sued for; consequently, he is estopped by the record

from denying that fact and putting it in litigation.

Cummins v. Bullock & Anderson, 3 Ky. Opin. 595.

Where appellant alleged in her petition that her husband gave her the property in litigation, and the appellee purchased on the faith of that allegation, she is estopped to allege or prove the contrary.

Robinson v. McLaughlin, 3 Ky. Opin. 614.

A vendor of a parol sale, who is asked regarding the title of his vendee, at a judicial sale of the interest of the vendee, and answers that the vendee has a perfect title thereto, is estopped to assert ownership subsequently, whether his statements were true or false, since the law holds the vendor bound by his statements, and will not allow him afterwards to assert a title in opposition to the title of the purchaser at the sale.

Dunn v. Conn, 3 Ky. Opin. 195.

A vendor of a parol sale of land, to whom all but a small portion of the purchase money was paid, possession having been given the vendee, and who in an answer to a suit for specific performance, admits the parol sale, but declines to perform further, claiming a breach of contract, is estopped from pleading the statute for a specific execution as to creditors of the vendee; nor can a rescission of the contract be had, as against the creditors, both the vendor and the vendee being co-defendants to a suit for specific execution.

Dunn v. Conn, 3 Ky. Opin. 195.

A defendant, who, by cross-petition, is permitted to have a judgment entered by agreement can not be subsequently heard to controvert the right of others, coming into possession of the property, by reason of his failure to perform said judgment.

Taylor's Admr. v. Berry, 3 Ky. Opin. 241.

Where plaintiff's petition, after setting out the policy of insurance and the loss of the property insured, states "that the agent of the said company is now here and refuses to pay the plaintiff the said amount, as the said

company was bound to do by said policy," the company is not estopped from insisting that the appellee should comply with the stipulations of the policy, and the petition presents no cause of action.

Kentucky Ins. Co. v. Green, 5 Ky. Opin. 370.

An answer was held not to create an estoppel against defendants or their vendees.

Watson v. Husbands, 6 Ky. Opin. 543.

Where defendant must be regarded by his defense made as having consented that plaintiff should have a right of way over defendant's land in consideration of a sum allowed therefor by the jury, he is estopped to claim possession as against plaintiff, and it does not matter that he had not parted with the title by conveyance, or bound himself by writing to do so.

Pollock v. Germantown & Bridgeville Tpk. Co., 6 Ky. Opin. 324.

That plaintiff in an action for damages to his real estate worked for the defendant railroad company when the alleged trespass was committed, does not estop plaintiff from asserting his claim for the damages.

Nashville & Chattanooga R. Co. v. Murphy, 6 Ky. Opin. 118.

The record of a suit concerning land held sufficient to estop defendant from questioning plaintiff's right to possession of the land.

A. H. Pollock v. Germantown & Bridgeville Tpk. Co., 6 Ky. Opin. 324.

Where a defendant has set up a verified plea of non est factum in an action on a note, he can not, in a subsequent suit involving the same transaction (after plaintiff, because of such plea, dismissed his action), take a position contrary to the allegations of the plea.

Bergs & Co. v. Haggard, 6 Ky. Opin. 393.

One who misleads his adversary in court by deception can not be allowed to profit by his own wrong, and where a plaintiff brings a defendant into court he will not be permitted to say,

by misleading the defendant as to his intention, that such defendant shall not be heard.

Smith v. Lewis, 12 Ky. Opin. 338.

Where one fails to have his deed recorded within the proper time, but in a proceeding in the county court thereafter for partition the land described is allotted to him by reason of said conveyance, and his grantors in said deed are parties to such partition, and the court had jurisdiction therein, such grantors are estopped from asserting any claim as against said grantee or his vendees.

Singleton v. Singleton, 12 Ky. Opin. 342.

In an application to set aside a sale of real estate because a necessary party was not before the court, when it is shown that such party or his heirs have accepted the greater part of the money coming to them under such sale, and the application is made many years after the payment of such money, such applicant will be held to be estopped to maintain such action.

Hackler v. Nicholson, 12 Ky. Opin. 606.

§ 70. Failure to assert title or right.

Where a devisee agreed with his brothers and sisters as to a boundary line of the land devised to them by their father, whereby he was to have all the land east of such line, and he stood by and permitted the land west of the line to be sold without giving any warning or notice of claim thereto by him, he is estopped to assert a claim to any portion of the land west of such line.

Laney v. Pase, 7 Ky. Opin. 587.

Where a party repudiates a parol contract for the sale of land and refuses to execute it, he is estopped to claim any of the benefits arising therefrom.

Clemerson v. Harris, 3 Ky. Opin. 403.

§ 71. Disclaimer.

A defendant in a suit for partition of land, who confesses that he has no right or title to the property, is estopped from afterwards setting up any adverse claim to any portion of the land embraced in the judgment,

unless he or his vendees present such a state of case as will authorize a chancellor to vacate or modify it as provided by the Civ. Code.

Shelton v. Melton, 6 Ky. Opin. 492.

§ 72. Acts making injury possible as between actor and another equally blameless.

Where one has executed notes as the purchase price of real estate, which the seller is unable to convey because he has no title, but before the failure of title is known one who is about to purchase the notes is assured by the maker thereof that they are all right and will be paid, such maker is estopped, so far as the holder of the notes is concerned, to set up a failure of consideration, although the consideration may have failed as between him and obligee in the notes.

Tierney v. Dean, 9 Ky. Opin. 893.

§ 73. Clothing another with apparent title or authority.

§ 74.—Real property.

Where appellee was present when the land in controversy was sold to appellant, and advised the purchase, and talked of buying it himself, and knew the trouble connected with the title, it was his duty to have explained to appellant the character of the vendor's title, and for failure to do so, he is estopped to set up an adverse claim to the land.

Cantrill v. Eastis, 6 Ky. Opin. 23.

Where adult heirs made deeds to their interests in land of the testator, and received the purchase price, they are estopped from setting up any claim to the land, either in their own right, or as heirs of the deceased sister.

Lester v. Winfrey, 6 Ky. Opin. 121.

§ 78 Contracts.

A corporation which has borrowed money and used the same in completing its turnpike, is estopped from showing its non-liability to repay such loan.

Chenault v. Grigsby, 9 Ky. Opin. 258.

§ 82. Representations.

Where one has a right to an estate and permits or encourages a representation as to it which works a fraud, he will be refused any relief in a court of equity.

Kendall v. Webber, 13 Ky. Opin. 206.

§ 86.—Validity of bills or notes.

The payor of a note is not estopped to make defense to the note because of the statement made to the payee, or to the payee's agent, that the note was "all right."

Thompson v. Finley, 6 Ky. Opin. 641.

§ 89. Acquiescence.

An alleged vendee of a tract of land who was present at a subsequent rental of same by a commissioner as the land of his vendor, and is the highest bidder therefor, and does not make known his ownership, can not afterwards set up claim to same as against the rights of creditors.

Dunn v. Conn, 3 Ky. Opin. 195.

An alleged owner of personal property, who is present and makes no objection to a transfer thereof by another party, is estopped from afterwards setting up a claim thereto.

Kash v. Fitzpatrick & Looney, 3 Ky. Opin. 36.

Where an owner of property stood by and saw a city council act on a declaration of a greater number of owners, for street improvements, by doing the work and improving the property, he can not be permitted to refuse payment therefor.

Menzies & Finnell v. Williams, 4 Ky. Opin. 552.

When covert and discover a woman persistently and notoriously claimed only a life estate, conceding to her children the remainder, promoted the sale of that remainder for a valuable consideration, was present when it was conveyed and neither then nor since until about the time of the institution of suit, intimated a claim to the remainder, she is estopped to set up claim to the remainder.

Jackson's Heirs v. Dunnean, 5 Ky. Opin. 690.

Where the defendant recognizes the regularity of the judgment and surrenders to the sheriff, in writing, the land sold in satisfaction of same; to this extent he encourages the purchaser and is therefore estopped to controvert his right to take and hold the estate.

Johns v. Woodson, 5 Ky. Opin. 536.

Where a party is active in procuring another to advance money on the faith of a mortgage, he is estopped to deny the title of the mortgagor to the property.

Smith v. Warth, 5 Ky. Opin. 269.

§ 90.—Assent to or ratification of acts of others in general.

Where one representing himself as the owner of the land to induce another to erect a mill on it leased his land for such purpose, gave his written consent to the erection of a dam across the river, gave the stone for the foundation of the mill, and although he saw the mill and a dwelling erected, made no objection to either until long after both were completed and the lessee had sold his interest in the mill, he will be held to have consented not only to the erection of the mill, but to the erection of the dwelling also, and will be estopped to repudiate such consent.

Hume v. McNees, 10 Ky. Opin. 616.

If a party has an interest to prevent an act being done, and acquiesces in it so as to induce a belief that he consents to it, and the position and right of others is altered by their giving credit to his sincerity, he is estopped from challenging the act to their prejudice.

Klump v. Liebold, 11 Ky. Opin. 421.

The owner of an interest in real estate who has notice of a sale thereof by an administrator, and who acquiesced therein and accepted some of the proceeds thereof, is precluded in equity from asserting claim to such land or the possession thereof.

Smith's Admr. v. Blair, 12 Ky. Opin. 454.

§ 91.—Assent to or participation in judicial proceedings.

Where a copy of a receipt is offered in evidence, and its execution is denied, the burden is on the proponent to show that the other party signed it.

Gallagher v. Mitchell, 7 Ky. Opin. 722.

One who has consented in open court to an order setting aside a sheriff's deed can not complain of such order; neither can one complain of such order who is not prejudiced by it.

Bottom v. Bonta's Exr., 9 Ky. Opin. 619.

§ 93.—Permitting improvements or expenditures.

One who acquiesces in the erection of a column when it is partly on his land, by both words and conduct intimates his consent thereto, was present while the work was being done and expressed his satisfaction with it, is estopped from thereafter objecting to it.

Klump v. Liebold, 11 Ky. Opin. 421.

§ 94.—Permitting sale or mortgage of property.

Where appellant's surrender of his land to the jailer to sell in lieu of the personal property was without consideration, and the result of illegal coercion, the principle of estoppel does not apply.

Owens v. Hudson, 1 Ky. Opin. 298.

A purchaser of land with notice of renunciation of title by vendor, and of a prior sale of same land with the concurrence of the vendee under a parol sale, is estoppel from claiming title by subrogation.

Renfroe v. Underwood, 1 Ky. Opin. 23.

Where funds are placed in the hands of a third party by a husband, with which to purchase a home for himself and wife, and afterwards he is present and does not object to the conveyance being put in the wife's name, he will be estopped from claiming an improper use of the money and recovery thereof.

Hull v. Evans, 2 Ky. Opin. 538.

The father of the remaindermen, having purchased their interest at execution sale, his note therefor is subject to be paid out of the deceased's estate; but this will not affect the life estate of the wife in the land, and she can not be estopped from asserting her tenancy to the tract.

Thornton v. Peacock, 2 Ky. Opin. 526.

A mortgagee who knowingly permits and sanctions the sale of lands embraced in his mortgage, and allows the purchaser to occupy same adversely to his claim for a period of years before he discloses his claim, is estopped from asserting his claim under the mortgage, against the purchasers of the property.

Stone & Skinner v. Lyon, 2 Ky. Opin. 517.

A failure to disclose a lien on personal property for many years after a sale thereof by the mortgagor, and with the knowledge of the mortgagee, is such negligence as to operate as an estoppel against the claim.

Stone & Skinner v. Lyon, 2 Ky. Opin. 517.

Where the maker of a note is present when a transfer thereof is made from one holder to another, and offers no objection thereto, but says that the note is good, and offers to settle it by delivery to the holder of other collateral therefor, he will be considered as having waived any claims, demands, or offsets he may have to the note.

Estes v. Abbott, 2 Ky. Opin. 284.

One who stands by and permits another to purchase land of which he is the owner, without asserting his claim, will be estopped to assert it afterward against the purchaser.

Jarvis v. Satterwhite, 11 Ky. Opin. 167.

Where town trustees and citizens of the town generally petitioned the legislature for authority to sell a public street to a college for educational purposes, in 1850, and the college erected valuable buildings thereon after purchasing it, whether such sale was valid or not, the college having made such improvements and held ex-

clusive possession thereof since 1850, is secure in its title as against the town, and is estopped from questioning such title.

Brown v. Stubblefield's Admr., 11 Ky. Opin. 767.

§ 95. Silence.

One who stands by and knows that another is purchasing land to which he has or asserts a claim, will be estopped to set up such claim to the prejudice of such purchaser.

Wise v. Fields, 10 Ky. Opin. 280.

While mere silence or acquiescence when in ignorance of one's rights will not work an estoppel, where one was present and acquiesced in the construction of a turnpike, knowing that the company believed that it was constructing the road on another's land, and asserted no claim of ownership thereof during such construction and for many years thereafter, the legal presumption being that he knew the boundary of his own land, it is incumbent on such a plaintiff to show that he was in ignorance of the fact that the land on which the turnpike was constructed belonged to him.

Ramsey v. Clark & Montgomery Tpk. Co., 10 Ky. Opin. 751.

The holder of a lien against real estate, which is of record, can not be held to be estopped from asserting his lien because of his silence in not informing a purchaser of such land that he holds the lien, where it is not shown that the lien holder was present when the purchaser bought the land, or when he paid for it, or that he advised or encouraged such sale; and no estoppel can arise against a lien holder on account of his mere delay in enforcing his lien.

Medley v. McElroy, 13 Ky. Opin. 289.

§ 96. Negligence.

To estop one, there must exist some intended deception or fraud in the conduct of the party to be estopped, or such gross negligence on his part as amounts to constructive fraud by which the complaining party has been misled to his injury when he had no knowledge or available means of

acquiring knowledge of the true state of facts.

Lashley v. Lackey's Admr., 12 Ky. Opin. 78.

(C) PERSONS AFFECTED.

§ 98. Persons estopped.

Where A sells and transfers to C the note of B and on the due date of the note B voluntarily renews the note to C, he is estopped from setting up a counterclaim of a prior debt due him by A, even though such a right of set-off existed as to the original note.

Scott & Wurts v. Ryan & Grubb, 1 Ky. Opin. 424.

Where a wife voluntarily parts with her heritage from her father's estate, and consents and agrees that the price should be applied to the payment of her husband's debts, the money being so applied, she is estopped from setting up claim thereto, and a court of equity can not grant the relief sought to reclaim it.

Hackley v. Collings, 1 Ky. Opin. 593.

A party executing a note to a corporation is estopped to deny that such a corporation existed as was described in the note.

Peter & Harber v. Ferrell, 1 Ky. Opin. 255.

One who holds a majority of the stock of a corporation and has control over the management of the corporation, is estopped to assert relief prejudicial to the rights of a mortgagee and the bondholders of the corporation.

Alexander's Exrs. v. Airdree Coal Co., 7 Ky. Opin. 329.

One who connives with a debtor for the purpose of defrauding the latter's creditors can not subsequently be heard to complain of his situation as a consequence of such action.

Higdon v. Beck, 7 Ky. Opin. 127.

(D) MATTERS PRECLUDED.

§ 101. Title or claim to property.

The possession of a bond for title for a number of years, in which a specific boundary is designated, will es-

top a defendant from claiming a defect in the boundary.

Pack v. Lingenfelter, 3 Ky. Opin. 313.

The parties to a deed are estopped by the recitals therein to claim title to any part of the land thereby conveyed.

Everett v. Anderson's Admr., 3 Ky. Opin. 414.

(E) PLEADING, EVIDENCE, TRIAL AND REVIEW.

§ 109. Pleading as defense.

A plea of fraud and undue influence in execution of a deed in consideration of support can not be substantiated, if, after submitting to it for more than eighteen years, while the grantee was supporting his parents; after demise of the grantors the heirs should not be permitted to attempt the vindication of their injured parents' rights, when too late to do them any good, and when all the benefits would inure to them.

Bradford, Admr., v. Kirby, 2 Ky. Opin. 587.

§ 117. Admissibility of evidence.

An assertion made in an answer, in another case, that the party held the absolute title to the property may be used against him in another action involving the same property, on which he claimed to hold a mortgage instead of an absolute title; but it does not operate as an estoppel, so as to conclude all explanatory proof to the contrary.

Miller v. Poffinger, 1 Ky. Opin. 567.

§ 118. Weight and sufficiency of evidence.

In the absence of proof of the insolvency of a debtor, and the evidence conduces to show that all personal property assigned for the benefit of creditors was ample to liquidate all claims, the creditors will be estopped from further action to set aside conveyance of real estate as fraudulent.

Young & Co. v. Board's Heirs, 2 Ky. Opin. 541.

EVICTION.

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EVIDENCE.

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Action on account, see Account, § 18.

Admissibility of deed, see Deeds, § 198.

Admissibility of deposition in evidence, see Depositions, § 87.

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Admissibility of partnership books, see Partnership, § 121.

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As to consideration of contract, see Contracts, § 87.

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Pleading evidence, see Pleading, § 11. Presumption and burden of proof, see Bonds, § 130.

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Reception of evidence, see Trial, IV; Criminal Law, § 1153.

Recitals of deed, see Deeds, § 198.

Sufficiency of evidence, see Appeal, § 693.

Waiver of best evidence, see Judgment, § 917.

Weight and sufficiency of evidence, see Bills and Notes, § 515.

I. JUDICIAL NOTICE.

§ 10. Geographical facts.

The court judicially knows that a named county is in the state of Kentucky, and that a named town is the county seat.

Minton v. Beard, 8 Ky. Opin. 630.

§ 11. Historical facts.

The court judicially knows, as a matter of history, that in July and August, 1864, the confederate forces occupied no portion of Kentucky, and that except a few small detachments of irregular cavalry, there were no hostile troops within her borders.

Mercer v. Humphrey, 7 Ky. Opin. 141.

§ 16. Language, words, phrases and abbreviations.

It can not be judicially known what the cabalistic letters "U. S." mean, since there is no legal definite, technical manner attached to them, nor can it be determined that the words "the government" mean any other government than that of Kentucky.

McCormick v. Garth, 1 Ky. Opin. 588.

§ 27. Laws of the state.

§ 28.—In general.

The courts will take notice of the contents of the legislative journals for the purpose of determining the truth or falsity of any allegation or fact, but they will not examine such journals for the purpose of ascertaining facts, to rebut the presumption of

the constitutionality of an act, unless the complaining party alleges the existence of such fact.

Presiding Judge of Washington County Court v. Cumberland & O. R. Co., 3 Ky. Opin. 580.

While the courts will take judicial notice of special and local acts of the legislature to support the exercise of the authority delegated, they will not, in the absence of averment, presume the existence of special and unusual powers in ministerial tribunals or officers.

Williams v. Owen County Court, 9 Ky. Opin. 378.

§ 41. Existence, organization, and terms of courts.

Courts will take judicial notice of terms of court, and a sale of land made on other than the first day of a term is void.

Cheek v. McKay, 5 Ky. Opin. 199.

§ 43. Judicial proceedings and records.

Where it does not appear from the pleadings or proof in the case of R, trustee, etc., that the infant owns any part of the land in question, but this fact appears in another suit, which is consolidated with the former, notice of all the facts disclosed in that case, must be taken.

Rudd & Monarch v. Rudd & Taylor, 5 Ky. Opin. 517.

When courts or jurors are called upon to estimate values, they may do so from their personal and private knowledge of such values.

Davis v. Watts, 9 Ky. Opin. 169.

II. PRESUMPTIONS.

§ 54. Grounds.

Good faith will be presumed in the transfer of property, in the absence of proof tending to rebut such presumption.

Knowles v. Burns, 7 Ky. Opin. 70.

The fact that the plaintiff did not take the deposition of his manager with regard to the acts of plaintiff raises no presumption unfavorable to plaintiff.

Robinson's Trustee v. Hamilton, 6 Ky. Opin. 419.

§ 57. Nature and condition of property or other subject-matter.

The court, without evidence, will presume that a town lot is not susceptible of division without substantially impairing its value.

Hendricks v. Garrett, 10 Ky. Opin. 547.

§ 82. Judicial proceedings.

While there is no rule requiring this court to presume in favor of the finding of facts made by the chancellor, as in cases at common law, still much importance should be given the views of the chancellor in a case of fraud where doubt may well be entertained as to the truth of the charge.

Whaley v. Freeland, 9 Ky. Opin. 392.

III. BURDEN OF PROOF.

§ 91. Party asserting or denying existence of facts.

Where plaintiffs' right to the property in question depends on the survivorship of their mother and another, the burden of proving survivorship is on plaintiffs.

Cravens, etc., v. Gray, 6 Ky. Opin. 472.

The burden of proof is on the parties to a voluntary conveyance to show that a stated consideration, admitted by them to be erroneous, is not valid and nothing is owing thereon.

White & Hill v. Fletcher, 2 Ky. Opin. 463.

Where defendant alleges in his answer negative averments which are peculiarly within the knowledge of defendant, the burden is upon the defendant to prove such averments.

Carpenter v. Goode, 4 Ky. Opin. 655.

In a suit to subject the property of W to the payment of creditors of G, on the ground that W had converted a note belonging to G, the burden of proof is on the plaintiff to show that the note in controversy was the property of G, and no explanatory proof is required by W until some evidence

has been adduced showing some right to it by G.

Edwards v. Dickerson, Rice & Bishop, 6 Ky. Opin. 127.

Where a defendant sets up a breach of condition in a deed as a set-off, the burden is on him to show with reasonable certainty the amount he should receive.

Murray v. Webb, 6 Ky. Opin. 198.

The burden is on the plaintiff to establish his claim, and upon the defendant to establish his cross-demand or set-off against the plaintiff.

Cooper v. Cooper's Admr., 7 Ky. Opin. 84.

In an action to recover water rental at an established rate, the burden is on the plaintiff to show that the rates had been fixed by them.

Dayton v. Newport Water Works, 11 Ky. Opin. 777.

§ 94. Extent of burden in general.

Where, if exceptions to a master's report be treated as an answer, they do not deny the purchase or appropriation of the property in question, but set up matter in avoidance, the burden is on defendant to establish some one of his grounds of defense.

Robinson's Trustee v. Hamilton, 6 Ky. Opin. 419.

§ 96. Matters of defense and rebuttal.

Where the answer fails to impeach the genuineness of the judgment exhibited with the amended petition, which declares the deed to appellant void and vacates and sets it aside, the facts thus appearing by the exhibit being uncontroverted, the burden is not on the plaintiff to produce other evidence of the facts which the judgment purports to prove.

Seal v. Ragland, 4 Ky. Opin. 335.

Where a replication states facts which, if proved, would countervail the import of the recital of a consideration in a deed offered by a defendant, and controverts the material allegations of a counterclaim, the burden of proof is on the defendant.

O'Toole v. Sham, 2 Ky. Opin. 333.

§ 97. Particular facts or issues.

The burden is on the one charging fraud to establish the same.

Bank of Kentucky v. Bright, 4 Ky. Opin. 561.

Where a defendant sought to avoid a bond on the grounds that the plaintiff procured his signature to the power of attorney by deceiving him as to its nature and object, such issue devolved on the defendant the burden of proving the facts thus alleged.

Brown v. Farnler, 3 Ky. Opin. 46.

IV. IRRELEVANCY, MATERIALITY AND COMPETENCY IN GENERAL.

(A) FACTS IN ISSUE AND RELEVANT TO ISSUES.

§ 99. Relevancy in general.

Evidence, unless it illustrate some issue made by the pleadings, is not allowable in judicial proceedings.

Gate v. Rouse, 4 Ky. Opin. 241.

All the facts and conduct of the parties while exercising ownership over the property in litigation, is competent to show the character of title and holding, both for defendant and for plaintiff.

McElroy v. Dunn, 3 Ky. Opin. 146.

While the recital, in an assignment of a bond for title, that it was made for a valuable consideration, is evidence as between the parties thereto, it is not evidence of the facts recited, nor for any purpose as against strangers.

Dunn v. Conn, 3 Ky. Opin. 195.

A judgment must be based as well upon the petition as the proof, and testimony which tends to establish some fact not alleged in the petition is irrelevant and incompetent.

Trimble, Admr., v. Hensley, 5 Ky. Opin. 730.

In the absence of a plea or claim of insanity or mental incapacity of a party to testify, it is irrelevant to prove his sickness and belief that death was approaching.

Powell v. Mead, 11 Ky. Opin. 292.

§ 108. Motive and intent.

It was held that defendant, in testifying, had the right to state facts attending the encounter, but not to state what his secret intention was, the intention being a matter of deduction from the circumstances proved.

Rodgers v. Flick, 7 Ky. Opin. 22.

§ 113. Value or market price of property.

Where the issue was the value of confederate money at the time and place when a loan was made, evidence is incompetent seeking to prove such value at other times or places.

Walker v. Henry, 10 Ky. Opin. 629.

(B) RES GESTAE.

§ 119. Facts forming part of same transaction.

A conversation which is not concomitant with the principal act nor connected with it so as to form a part of the res gestae but a mere narrative of past occurrences cannot be received as proof of the occurrence.

Campbell v. Seifer, 5 Ky. Opin. 68.

§ 120. Acts and statements accompanying or connected with transaction or event.**§ 121.—In general.**

Declarations made at the time of the transaction and expressive of its character, motive or object, are regarded as verbal acts, indicating a present purpose and intention, and are therefore admitted in proof like any other material facts.

Howk v. McManama, 4 Ky. Opin. 234.

All declarations, made at the same time the main fact under consideration takes place and which are so connected with it as to illustrate its character, are admissible as original evidence; but where one who is charged with participating in a tort in plundering a store, comes into town where the store is with the plunderers, but takes no part in aiding them, and during such plundering is in another part of the town protesting against the act, and on being asked by the plunderer to loan

him his horse refuses to do so, declaring that his horse will not be used to carry off stolen property, and that it will not be used for such purpose so long as his pistol will fire, etc., and such declarations are not shown to be made other than in good faith, they are admissible in evidence as a part of the *res gestae*.

Dils v. May, 11 Ky. Opin. 619.

§ 122.—Before transaction or event.

A statement of a party as to why he is borrowing money from a witness, to the effect that he desires it to pay a note, is not admissible in a suit on such note, when made in the absence of the plaintiff; where such a statement is not a part of the *res gestae*, not having been made at the time the money was claimed to have been paid, and the payment was the transaction.

Cockrell v. Hainline's Admx., 8 Ky. Opin. 225.

§ 123.—After transaction or event.

Statements made after the transaction in question and not in the presence of the party sought to be affected thereby are not admissible as part of the *res gestae*.

Adams v. Martin, 6 Ky. Opin. 6.

In a case where a common carrier is sued for damages on account of its wilful neglect resulting in the death of a passenger, the admissions or declarations of the company's employees made days thereafter are not a part of the *res gestae* and not admissible in evidence to bind the defendant, since they are but statements of past events.

Hanks' Admr. v. Louisville & Cincinnati Mail Line Co., 12 Ky. Opin. 764.

(E) COMPETENCY.

§ 148. Nature and source of evidence in general.

The fact that a witness had reduced his knowledge of the manner in which the estimate was made to writing, in the form of an affidavit or deposition, is no reason for excluding what the witness knew in regard to the con-

troversy, although the same statements may be found in the writing.

Grimes v. Trimble, 6 Ky. Opin. 703.

It is error for the court to refuse the introduction of testimony of one defendant to prove agreements between him and a codefendant, who filed a separate answer, and which would sustain a plea of exoneration.

Boice & Shannon v. Mitchell & Barber, 1 Ky. Opin. 170.

In an action on a note in which defendant pleads payment, alleging that plaintiff accepted payment in full of confederate money, where plaintiff pleaded the illegality of the confederate money, it was error to refuse to permit plaintiff to testify to such matters in his own behalf.

Williams v. Godsay, 8 Ky. Opin. 210.

§ 152. Testimony as to character or reputation.

The rule in civil actions is that evidence of the general character of a party to the action, is never admissible; unless the action involves the general character, or directly affects it.

West v. Mason, 2 Ky. Opin. 316.

§ 158. Facts or transactions described in or evidenced by writing.

Where, for an account of M, a creditor accepted, through his agent, the note of V, giving the following receipt: "Received J. T. Vanarsdale's note one day, date, for above amount, being in full. R. M. Bishop & Co. H. C. T.," in an action against M on the account the receipt was the best evidence of the acceptance of the note in full payment.

Bishop & Co. v. McKee, 4 Ky. Opin. 570.

§ 160. Contents of writings.

Oral testimony is incompetent to prove the contents of an account book, without first accounting for the non-production of the book itself.

Staples v. Leonard, 3 Ky. Opin. 659.

§ 162.—Judicial acts, proceedings and records.

A receipt purporting to have been given by a deputy sheriff, in the absence of proof of his signature, is not competent evidence as to the issue of an execution, because the execution itself or the execution docket is the highest evidence.

Griffith v. Hicks, 5 Ky. Opin. 687.

V. BEST AND SECONDARY EVIDENCE.

§ 176. Grounds for admission of secondary evidence.

§ 177.—In general.

Before a copy of a recorded writing can be read in evidence it must appear that the original was authenticated in the mode provided by the statute.

Harlan v. Hardin, 8 Ky. Opin. 587.

§ 186. Character and degrees of secondary evidence.

Where a paper offered in evidence does not purport to be a copy, and the one who has the custody of the original fails to certify that it is a copy, the court has no right to conclude that it must be a copy, upon the presumption that it came from the hands of the custodian; but before such a paper can be introduced in evidence it must be certified to be a copy of the original by the custodian of the original.

Barrett v. Godshaw, 10 Ky. Opin. 324.

VII. ADMISSIONS.

(A) NATURE, FORM AND INCIDENTS IN GENERAL.

§ 200. Nature and grounds for admission in general.

Nothing can be taken as confessed against the party who is before the court, simply upon constructive notice.

Moberly v. Moberly, 6 Ky. Opin. 77.

Confessions or admissions are the strongest evidence against the party making them if they are clearly established, the only weakness being in

the evidence of confessions or admissions.

Niblack v. Niblack, 6 Ky. Opin. 545.

§ 201. Subject-matter.

The statements or confession of a party to an action, in relation to the subject-matter of the controversy, as a general rule, are competent as evidence against him; but such statements or confessions must have been made by him, or made in his presence, and assented to by him, and an attorney's statements made in the absence of his client are not competent evidence.

Critchelow's Admr. v. Hagerman, 1 Ky. Opin. 159.

§ 203. Capacity of person making admission, and voluntary character thereof.

On an indictment for murder, the admissions of other persons than the accused that they did the killing are not evidence; and neither are threats to kill made by other persons evidence in such a case.

Cloud v. Commonwealth, 13 Ky. Opin. 1092.

§ 212. Offers of compromise or settlement.

§ 213.—In general.

The proposition of an administrator, for a compromise of a less sum than the amount of his claim, which was not accepted, is not conclusive against him and should not be offered in evidence as such.

Rause v. Deacon, 4 Ky. Opin. 219.

In the trial of a suit for damages for personal injuries, evidence is incompetent to show that an effort was made to settle and compromise the claim, or that an offer of compromise was made.

Kentucky Cent. R. Co. v. Carey, 12 Ky. Opin. 392.

§ 215. Statements in writing.

Where suit is brought to collect a debt, and a letter of the debtor is introduced, stating that "I am owing you an old debt, and would like to know if I do (go into business), if you will press me for it, as my intention is to pay you," it was held to be an express acknowledgment that

the debt was then a valid and subsisting obligation, and also an express declaration to pay it.

Frost v. Cuerion & Hayden, 9 Ky. Opin. 743.

§ 216. Oral statements.

Conversations between defendants prior to suit may be admitted as evidence, to establish a joint or several holding of property sued on.

McElroy v. Dunn, 3 Ky. Opin. 146.

§ 220. Acquiescence or silence.

Acquiescence in the statements of others, to have the effect of an implied admission of the truth of such statements, must be not only such as afford him an opportunity to act or to speak, but such as would naturally call for some action or reply from men similarly situated.

Jett v. South, 9 Ky. Opin. 813.

(C) BY GRANTORS, FORMER OWNERS, OR PRIVIES.

§ 230. Grantors, vendors, or mortgagors of real property.

An admission made after others have acquired separate rights in the same subject-matter can not be proved to disparage their title, however such admissions may affect the title of the declarant himself, and this doctrine applies to grantor and grantee.

Judah v. Whalen, 12 Ky. Opin. 28.

(E) PROOF AND EFFECT.

§ 263. Explanation or limitation.

Where statements and admissions made by the propounder at the date of the execution of the will have been shown in evidence, he may be allowed to explain his conduct or to deny that he made such statements as detailed by the witnesses, and it is reversible error for the court not to permit him to testify, he being a competent witness.

Ogden v. Ogden, 13 Ky. Opin. 35.

VIII. DECLARATIONS.

(A) NATURE, FORM, AND INCIDENTS IN GENERAL.

§ 272. Declarations against interest in general.

Statements made by either party on propositions of compromise of a law-

suit can not be proven against those making them, unless the compromise is effected.

McKee v. McKee, 9 Ky. Opin. 805.

§ 273. Declarations of person in possession or control as to title or possession.

The declarations of the seller of lumber, made at the time of sale, are competent as to the question of ownership of the property.

Sowards v. Henderson, 5 Ky. Opin. 100.

The declarations of a person while in possession of land are admissible to prove the character of that possession.

Harlan v. Hardin, 8 Ky. Opin. 587.

The declaration as to ownership of property is not admissible as evidence to prove title in the declarant, unless he was in actual possession at the time made.

Phillips v. Pipes, 9 Ky. Opin. 906.

(E) PROOF AND EFFECT.

§ 313. Conclusiveness and effect.

The mere declaration of a party made on but the one occasion, in a conversation not addressed to either of the witnesses who, years after, are called upon to prove them, in the hearing of no others, and in the treasuring up of which they could have no interest, they being strangers to the speaker, is at most but weak and unsatisfactory evidence.

Daniel v. Wheeler's Exr., 5 Ky. Opin. 738.

X. DOCUMENTARY EVIDENCE.

(A) PUBLIC OR OFFICIAL ACTS, PROCEEDINGS, RECORDS, AND CERTIFICATES.

§ 332. Judicial acts and records.

It was held error to permit plaintiff to read to the jury a petition and account filed therewith in another case against defendant and to reject the rest of the pleading.

Bollanger & Bodley v. Pierce, 6 Ky. Opin. 421.

However irregular may have been the records of a suit, unless it is void, it is not subject to be collaterally questioned, and it is error to exclude same as evidence in another suit subsequent thereto.

Slade v. Eckler, 3 Ky. Opin. 347.

It is immaterial whether the papers in a suit competent to be used on the trial of another cause pending in the same court be filed before or after the trial is commenced.

Turpin v. Bethel, 3 Ky. Opin. 397.

Evidence, in the form of a record of another suit pending in a different state, between the litigants, cannot be offered where no allegations of same are set out in the pleadings.

Hoskins v. Murphy, 4 Ky. Opin. 338.

The proceedings of the Court of Appeals can only be proved by a properly attested copy of its records.

Green v. Davis, 5 Ky. Opin. 660.

Where a writing purporting to have been executed by one of the parties is referred to and filed with a pleading, it may be read as genuine unless its genuineness is denied by affidavit before trial.

Champlin v. Betz & Schraeffenberger, 5 Ky. Opin. 231.

A memorandum in writing or an account filed as an exhibit and referred to in the pleadings cannot be read as evidence on the trial.

Champlin v. Betz & Schraeffenberger, 5 Ky. Opin. 231.

The record of a prior suit between different parties is not competent evidence in a subsequent suit.

Robinson v. Hudson, 5 Ky. Opin. 256.

Under § 18, ch. 35, Revised Statutes, requiring that records and proceedings of the courts of the United States shall be attested by the clerk with the seal of the court annexed, and certified by the judge of the court to be attested in due form before they shall be entitled to faith and credit

in this state, the court properly refused to allow a certificate of discharge in bankruptcy to be read in evidence.

Hamilton v. Barnes, 5 Ky. Opin. 167.

It is error to admit in evidence a judgment, deed and execution in another case, when at the time of the levy and sale the land in controversy was in the adverse possession of appellee, such sale being void.

Kenton Furnace R. Co. v. Lowder, 10 Ky. Opin. 844.

§ 333. Official records and reports.

A sheriff's deed which is not accompanied by a judgment or other record evidence of the authority of the sheriff to sell the land, is not admissible in evidence to show title in the purchaser.

Price v. Lane, 6 Ky. Opin. 133.

In order to make the records of authentication of deeds evidence to establish title, it must be according to the statute and within the time prescribed, such records being admitted only to show extent of possession.

Goodman v. Bolton, Vass & Land, 3 Ky. Opin. 135.

A journal record made up of what the clerk of the common council recollects to have been the action of the council, is not competent evidence of the proceedings of the council.

Hornsby v. Judah, 7 Ky. Opin. 294.

§ 335. Grants and patents for land, and proceedings in land office.

Where a written lease is referred to in the petition and its genuineness is not denied by affidavit, it may be read in evidence without its execution first being proved.

Payson & Lyon v. Holden, 11 Ky. Opin. 771.

§ 337. Municipal records.

The record of the proceedings of the city council is the best evidence of such proceedings, and parol proof can not establish a fact required to be made a matter of record.

Clark v. Enoch, 8 Ky. Opin. 341.

(B) EXEMPLIFICATIONS, TRANSCRIPTS AND CERTIFIED COPIES.

§ 343. Records of conveyances and other private writings.

A deed dated July 7, 1807, acknowledged November 11, 1808, and recorded August 22, 1809, more than eight months after the acknowledgment, and more than eighteen months after the sealing and delivery of the deed, according to the Acts 1785 and 1797, was not recorded in time to render a certified copy of it competent evidence.

Bingham v. Orr, 11 Ky. Opin. 169.

(C) PRIVATE WRITINGS AND PUBLICATIONS.

§ 350. Unofficial writings in general.

A paper purporting to be a receipt of the wife is not admissible in evidence in action against the husband, in the absence of evidence to show that she was authorized by her husband to receive the money, or that it received by her it was with his knowledge and consent.

Smith v. Ryan, 10 Ky. Opin. 453.

Account books duly authenticated may be introduced in evidence in a suit, but copies of such account books can not be so introduced.

Bailey's Admr. v. Thompson, 8 Ky. Opin. 280.

§ 352. Corporate records and proceedings.

A stipulation in relation to the certificate of the chairman of an executive committee of the trustees, relates to the requisite evidence to authorize a recovery, and is not a means of giving notice to the obligor therein, preliminary to a right of action.

Martin v. Trustees of Baptist Education Society, 4 Ky. Opin. 283.

§ 353. Conveyances, contracts and other instruments.

Where an affidavit is not excepted to the court must regard it as evidence.

Hutti v. Fillion, 1 Ky. Opin. 387.

The recitals in a deed are not evidence against a stranger, although

they are as between the parties to the instrument.

White & Hill v. Fletcher, 2 Ky. Opin. 463.

§ 354. Books of account.

The account books of a company are not competent evidence against a party who was neither a stockholder nor officer in the company at the time the entries were made.

Shaler v. Newport Fuel Co., 5 Ky. Opin. 283.

§ 360. Books and other printed publications.

§ 364.—Mortality tables and tables of expectancy of life.

In a suit for damages for malpractice against a surgeon, wherein it is alleged that the defendant failed to skilfully reduce dislocations of plaintiff's shoulder, and resulting in his loss of the use of his arm and hand, life or mortuary tables showing the average length of life are not admissible as evidence, since the plaintiff's expectation of life could have nothing to do with estimating the damages he was entitled to recover.

Dulaney v. Nunnery, 13 Ky. Opin. 710.

(D) PRODUCTION, AUTHENTICATION, AND EFFECT.

§ 366. Public documents, records, exemplifications, or official copies.

A survey is not admissible in evidence where no notice thereof was served that such survey would be made.

Hanners v. Baker, 12 Ky. Opin. 127.

The proper manner of proving a proceeding in court is to introduce in evidence a certified copy of the complete record of the proceeding.

Hanners v. Baker, 12 Ky. Opin. 127.

§ 369. Preliminary evidence for authentication.

§ 370.—Necessity in general.

Written evidence not duly authenticated is not admissible, and where on appeal the record fails to disclose that the offered document was authenti-

cated no error is shown by the court's refusal to admit it.

Bibb v. Hall, 11 Ky. Opin. 877.

§ 383. Conclusiveness and effect.

A receipt in settlement is not conclusive, but may be explained, varied or contradicted by the testimony, it being but prima facie evidence, and where given and accepted between persons bearing confidential relations, it should be closely scanned.

Dugan's Admr. v. Harris, 13 Ky. Opin. 297.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) CONTRADICTING, VARYING, OR ADDING TO TERMS OF WRITTEN INSTRUMENT.

§ 386. Judicial records and proceedings.

Parol evidence is not admissible to show that a restraining order signed by the special judge was signed on a date other than that on which he presided.

Potter v. Young, 6 Ky. Opin. 381.

Where parol evidence of the sale of the land was not objected to and if it had been the judgment and execution under which the sale was made could have been produced, the objection comes too late, when made for the first time in the Court of Appeals.

Goode's Admr. v. Goode, 5 Ky. Opin. 657.

§ 387. Official records and documents.

Where it appears upon the face of a patent that it is illegal, it may be considered null and void, but evidence of a fact dehors the patent is inadmissible in a collateral proceeding to avoid or defeat it.

Morse v. Boyd, 4 Ky. Opin. 35.

Oral testimony is not admissible to show that which the city records state is not true.

Clark v. Enoch, 8 Ky. Opin. 341.

§ 390. Deeds.

Parol testimony is admissible to establish a warranty.

Bever v. Dishman & Galloway, 6 Ky. Opin. 154.

The answers so far as they intimate that F. was to have 120 acres are inconsistent with the deed, and without a direct and positive averment that such was the trade, and that the written instrument through mistake or fraud did not set it out, could not be established by parol evidence.

Ferguson v. Tomlinson, 3 Ky. Opin. 651.

In a suit by children to show that their father held lands as trustee only for their mother, who was the real owner of the land, where the conveyance shows the father to have been a purchaser of the land, and that he paid its full value and has held the legal title for more than forty years, the mere recollection of parties as to what took place forty years before should not be permitted to destroy the written evidence of title.

Goodin v. Goodin, 11 Ky. Opin. 218.

§ 397. Contracts in general.

A written contract unimpeached, can not be controlled or modified by a simultaneous and contradictory parol agreement.

Graves v. Brown, 3 Ky. Opin. 417.

Parol evidence is not admissible to vary the terms or import of a writing, unless it is alleged that there was fraud or mistake in the execution thereof.

Park v. Price, 1 Ky. Opin. 17.

Though a receipt is only prima facie evidence of payment, and may be explained, or even contradicted by evidence aliunde; in the absence of evidence of a mistake, or that it was not precisely what the writer of it intended it to be, it will not be disturbed.

Alexander v. Sheets, 2 Ky. Opin. 607.

Terms of a written contract may be changed by parol proof, where it is shown that the written instrument was a mere form and included general terms applicable to other parties thereto.

Whalen v. Johnson, 3 Ky. Opin. 341.

A collateral parol agreement for indulgence not entirely consistent with

the writing is not enforceable against the written evidence of the contract.
Dewit v. Redwiltz, 5 Ky. Opin. 159.

It is a general rule that parol testimony will not be received to contradict, vary, add to or subtract from the terms of a valid written instrument, without first by appropriate averments laying a foundation for the admission of this character of testimony, such as fraud or mistake, or that the writing was by some improper or illegal means obtained.

Foreman v. Yocum, 9 Ky. Opin. 401.

While parol proof is not admissible to vary the terms of a written contract, where a mere memorandum is made and signed by one of the parties and is intended to evidence only the quantity and price, and not intended by the parties to contain the full terms of the contract, such a memorandum will not prevent extraneous testimony, since such a memorandum does not prevent the disclosure of what took place between the parties, nor is it conclusive of what the contract was.

Southern States Coal, Iron & Land Co. v. Moore & Co., 11 Ky. Opin. 916.

A conveyance of real estate on the faith of a parol agreement of the grantee to hold it for others, may be enforced when the consideration is merely nominal, and where there is a substantial consideration for the execution of a deed, and there is no allegation nor proof of a mistake or fraud to establish the agreement to hold the title for others, such parol agreement can not be shown by parol.

Garner v. Garner, 12 Ky. Opin. 1.

§ 400. Contracts of sale or exchange.

Where an answer denies that the writing sued on had any legal or binding force, and such defense is relied on, parol evidence as to the terms, etc., of the writing are admissible.

Cruse v. Clements, 4 Ky. Opin. 496.

§ 402. Bills and notes.

Without an allegation of mistake or fraud, a contract or agreement in parol different from that expressed in

the note, can not be relied on and proved.

Landsdale v. Wintersmith, 3 Ky. Opin. 617.

§ 405. Contracts of insurance.

Oral evidence is competent where the pleadings present the issue as to whether there was a mistake in reducing a contract of insurance to writing, and to do so is not a violation of the rule that a written contract can not be altered, erased nor added to without an allegation of fraud or mistake.

Continental Insurance Co. v. Randolph, 11 Ky. Opin. 125.

§ 419. Nature of consideration.

The consideration for the execution of a note may be shown by oral testimony, but such is not admissible to show that an unconditional promise to pay, reduced to writing, was not to be performed in a given state of case, unless fraud in reducing the contract to writing is alleged and proved.

Grover & Barker Sewing Mach. Co. v. Gibson, 8 Ky. Opin. 361.

(D) CONSTRUCTION OR APPLICATION OF LANGUAGE OF WRITTEN INSTRUMENT.

§ 461. Showing intent of parties as to subject-matter.

No presumption arises from anything contained in a will that the legacy to appellees was designed by the testator as a satisfaction of the debt he owed them, and parol evidence is not admissible to prove such intention.

Carter v. Willitt, 3 Ky. Opin. 400.

XII. OPINION EVIDENCE.

(A) CONCLUSIONS AND OPINIONS OF WITNESSES IN GENERAL.

§ 471. Conclusions and matters of opinion or facts.

Statements of witnesses which are mere deductions from facts to which they are called to testify are not admissible, such deductions being the province of the jury.

Townsend v. Commonwealth, 5 Ky. Opin. 785.

The opinions of witnesses as to mental capacity are not entitled to much

weight unless the facts upon which they are based are given.

Butt v. Boren, 8 Ky. Opin. 832.

§ 474. Special knowledge as to subject-matter.

The test of the value of opinion evidence as to the soundness of mind, in cases where it may be admitted, must depend upon the knowledge the witness has of the facts necessary to form a correct opinion and the capacity of the witness to deduce right conclusions from the facts.

Whaley v. Whaley, 9 Ky. Opin. 434.

§ 480. Handwriting.

It is a well established rule that the comparison of handwriting is not competent evidence.

Howard v. Hunter, 5 Ky. Opin. 535.

(B) SUBJECTS OF EXPERT TESTIMONY.

§ 515. Conduct of business.

In a trial on a complaint seeking to hold its cashier liable for loss resulting from the dishonesty of a bank teller serving under such cashier, it is proper for bankers and experts in banking to fully explain, as witnesses, the duties of a bank cashier, but such witnesses may not give their opinions to the effect that the cashier under the facts stated was guilty of negligence, the jury being capable from the evidence to form their own conclusions as to the question of negligence.

Pepper v. Planters' Nat. Bank of Louisville, 12 Ky. Opin. 219.

(E) COMPARISON OF HANDWRITING.

§ 564. Standard of comparison.

Where a non-expert witness states that a signature purporting to be his is not his, and that he knew his own signature from that written by others, it is improper and inadmissible in testing his knowledge on cross-examination to produce papers with a large number of signatures posted on them purporting to be his signature, and ask him to tell the jury which of these

signatures were genuine and which were not.

Loving v. Warren County, 10 Ky. Opin. 732.

(F) EFFECT OF OPINION EVIDENCE.

§ 569. Testimony of experts.

The conclusions of expert witnesses are entitled to very little weight where they do not agree either in their test or reasoning.

Smith v. Smith, 5 Ky. Opin. 722.

XIII. EVIDENCE AT FORMER TRIAL OF IN OTHER PROCEEDINGS.

§ 576. Death or disability of witness.

Refusal to permit a party to prove the testimony of a deceased witness given on a former trial, was not error, where it does not appear what the testimony sought to be established was, and it appears that the witness presented to prove the testimony of the deceased witness can not remember all that the deceased witness testified to, or even the substance thereof.

Jones v. Pearce, 6 Ky. Opin. 738.

The death, nonresidency or disability of a witness whose statements have been read on the first trial of a case does not deprive a party of the right to use them on the second trial, as embodied in the bill of exceptions on the first trial.

Smith v. Shacklett, 1 Ky. Opin. 482.

§ 579. Identity of parties.

There does not appear to have been such identity of parties, subject-matter and issues in another suit and this action as will authorize the reading of testimony taken in the former case as evidence in this.

Watts v. Whittington's Exrs., 1 Ky. Opin. 6.

XIV. WEIGHT AND SUFFICIENCY.

§ 584. Weight and conclusiveness in general.

The commissioner's report was offered to be read as evidence and objection thereto was overruled, the evidence upon which the report was

based, as well as the report itself, being referred to the jury, it was the province of the jury to give such weight to the whole as it deemed it merited.

English v. Kulp & Collings, 5 Ky. Opin. 655.

§ 601. Particular facts or issues.

For evidence held insufficient to establish the identity of a person as claimant of an estate after many years of absence, see the opinion.

Jordan v. Caldwell, 12 Ky. Opin. 66.

Where a person claiming an estate as a son is unable, when a witness for himself, to name the schools he attended when a boy, the names of any of his teachers or playmates, or names of places or events except those occurring or of which he gained knowledge after he was twenty-seven years old, such failure will cast suspicion as to his identity, for it is the rule among adults that they have knowledge and recollection of facts occurring during childhood.

Jordan v. Caldwell, 12 Ky. Opin. 66.

EXAMINATION.

Of garnishee, see Garnishment, § 149.
Of witnesses, see Witnesses, III.

EXCAVATION.

In street—Personal Injuries, see Municipal Corporations, § 782.

EXCEPTIONS.

See Objections.

Construction and operation of, see Deeds, § 140.

Effect of failure to take, see Appeal, § 276.

Necessity of, see New Trial, § 63.

Necessity to review on appeal, see Appeal, §§ 231, 238, 248, 249, 252, 258, 260, 265; Criminal, § 1047.

Presumption of waiver of, see Appeal, § 938.

Time of taking, see Appeal, § 272.

To award, see Arbitration and Award, § 27.

To commissioner's report—When constitutes appearance, see Appearance, § 7.

To depositions, see Depositions, § 102.
To instructions, see Appeals, §§ 215, 263.

To ruling of court must be shown by bill of exceptions, see Criminal Law, § 1048.

To ruling of court on motion for new trial, see Appeal, § 305.

To ruling on evidence, see Trial, § 99.
To rulings on instructions, see Appeal, § 216; Trial, §§ 282, 284.

To sale, see Judicial Sales, §§ 24, 30, 32.

Waiver of, see Appeal, § 280.

Waiver of exception to deposition, see Depositions, § 102.

EXCEPTIONS, BILL OF.

I. NATURE, FORM, AND CONTENTS IN GENERAL.

§ 1. Nature and purpose of remedy in general.

§ 11. Incorporating evidence.

§ 18. Incorporating instructions given.

§ 21. Insertion of documents.

§ 22.—In general.

II. SETTLEMENT, SIGNING, AND FILING.

§ 35. Time for presentation, allowance, and filing.

§ 36.—In general.

§ 38.—During or after term.

§ 39.—Time prescribed or allowed.

§ 40.—Extension of time.

§ 41.—Compliance with requirements.

§ 43.—Presentation and allowance after expiration of time.

§ 54. Procuring signatures or affidavits of bystanders.

§ 56. Certificate, signature, and seal of judge.

§ 57. Filing.

Bringing up rejected pleading by bill of exception, see Appeal, §§ 518, 678.
Conflicting bills of exceptions, see Appeal, § 586.

Evidence brought up by bill of exceptions, see Appeal, § 548.

Failure to file in time allowed, see Appeal, § 511.

Formal requisites, see Appeal, § 548.

Including instructions in, see Criminal Law, § 1089.

Matters embraced by, See Appeal, § 546.

Matters which must be brought up by, see Appeal, § 545.

Necessity of, see Appeal, § 544.

Necessity of signature to, see Appeal, § 613.

Not required on appeal from justice of the peace to circuit court, see Justices of the Peace, § 166.

Number of bills of exceptions, see Appeal, § 546.

Object of, see Criminal Law, § 1090.

Objections to filing of bill of exceptions, see Appeal, § 227.

Presumption as to rulings not included in, see Criminal Law, § 1144.

Time for filing bill of exceptions, see Appeal, § 351.

Time for making and filing, see Appeal, § 564.

Unchallenged statements in bill of exceptions taken as true, see Appeal, § 546.

I. NATURE, FORM, AND CONTENTS IN GENERAL.

§ 1. Nature and purpose of remedy in general.

A bill of exceptions will not be considered on appeal, unless it contains a statement that all the evidence introduced on the trial is embodied therein.

Swift's Iron & Steel Works v. Dye, 5 Ky. Opin. 261.

§ 11. Incorporating evidence.

A mere statement of the clerk that the paper copied in the record is the amendment offered and rejected by the court is not sufficient to identify it, but it should have been incorporated in a bill of exceptions.

Breashear v. Breashear, 4 Ky. Opin. 675.

Where the court rejects the divorced wife as a witness against her husband, what she would have proven must appear in the bill of exceptions.

Young v. Young, 5 Ky. Opin. 266.

Where a party offers to prove a fact which the court holds to be incompetent, he should make a statement as to

what the evidence would be on that point, and incorporate it into the bill of exceptions.

Johns v. Cassady, 5 Ky. Opin. 164.

Where a bill of exceptions contains the names of the witnesses and a statement of what each proved on the trial, after which it is said, "And here the proof closed," and "the court then on motion of the Commonwealth's attorney instructed the jury as follows," and here instructions followed, at the close of which is added, "to which instructions the defendant excepted," such language certainly imparts that the evidence contained in the bill of exceptions was all that was given and that the instructions therein copied are all that were given and refused by the court.

Myers v. Commonwealth, 5 Ky. Opin. 591.

§ 18. Incorporating instructions given.

Where there are numerous blanks in a bill of exceptions, the Court of Appeals can not determine which instructions were given or which refused.

Mays v. Beatty, 8 Ky. Opin. 46.

§ 21. Insertion of documents.

§ 22.—In general.

Where a pleading is rejected, and the pleader fails to make such pleading a part of the record by bill of exceptions or otherwise, no question is presented to the court.

Dimmit v. Fleming, 8 Ky. Opin. 78.

II. SETTLEMENT, SIGNING, AND FILING.

§ 35. Time for presentation, allowance, and filing.

§ 36.—In general.

Where the bill of evidence has been tendered in time, and the time of filing has been postponed by the court of its own motion, the provisions of the code were complied with.

Kentucky Tobacco Assn. v. William Halladay & Company, 7 Ky. Opin. 724.

A bill of exceptions can not be made up and signed in vacation, but time may be given till first day of the next term.

Wade v. Kirkfey, 3 Ky. Opin. 556.

A bill of exception should be prepared and filed at the term of the court at which the judgment is rendered, if at all practicable.

Winscott v. Bricken's Exr., 5 Ky. Opin. 723.

A bill of exceptions to be valid as such must be signed by the judge and filed during a term of the court and noted of record, and the court has no power to authorize a bill of exceptions to be prepared and filed in vacation.

Bradshaw v. Woodward, 5 Ky. Opin. 184.

When the bill of exceptions is filed and no exceptions to the order of filing are taken, no question as to them is raised.

Aetna Insurance Co. v. Burns, 8 Ky. Opin. 219.

An order permitting a bill of exceptions to be prepared and filed in vacation is void.

Aetna Ins. Co. v. Cundiff's Admx., 10 Ky. Opin. 158.

Where the appellant obtained a verdict against the appellee, and on motion it is set aside and a new trial granted, such appellant, who has prepared his bill of exceptions, is entitled to have it signed by the judge, although no appeal could be taken until the final determination of the case.

Cooper's Admr. v. Louisville & N. R. Co., 10 Ky. Opin. 387.

Under the law prior to the Act of 1878, amending subsec. 2, § 337, Civil Code of 1877, required that the party excepting should, at the close of the trial, unless further time be given him, prepare his bill of exceptions, and this was required to be done during the day on which the trial terminates, or the judgment becomes final, a trial held before the Act of 1878 came in force is governed by the former law, and a bill of exceptions tendered on May 4, when the motion for a new trial was overruled on May 1, 1878, is not in time, and does not become a part of the record on appeal.

Kentucky Central R. Co. v. Wells, 10 Ky. Opin. 922.

§ 38.—During or after term.

Where time was given until the second day of the next term of the court

in which to file a bill of exceptions, a tender of the bill of exceptions on the second day of the next term is a sufficient compliance with the order of the court and with the Code.

Ford v. Shobe, 7 Ky. Opin. 442.

An original bill of exceptions can not be made up after the expiration of the term, unless there is an order of court giving time for that purpose; and the court loses all power in the matter unless it be the power to correct the bill so as to make it conform to the record.

Minnis v. Commonwealth, 8 Ky. Opin. 495.

Act February 27, 1878 (Rev. Stat., § 337, subd. 2), authorizes the filing of bills of exceptions during the term at which the judgment becomes final, and though not in existence at the time the appeal is taken, since it affects the remedy only, it applies to it.

Daniel v. Hines, 10 Ky. Opin. 15.

When a judgment was rendered and a motion for a new trial was overruled at the October term of the court in 1877, the court had no power to extend the time for preparing and tendering a bill of exceptions beyond a day in the February term, 1878; and no bill having been filed at that term, the right to file it was lost, and one filed at the succeeding term is not part of the record on appeal.

Klein v. Newport Commission & Mortgage Assn., 10 Ky. Opin. 265.

§ 39.—Time prescribed or allowed.

A bill of exceptions can not be filed in vacation.

Elkin v. Skaggs, 1 Ky. Opin. 370.

Where a bill of exceptions was filed some four months after an order of court granting leave to file same October 26, 1867, and "time until Saturday next is given to file a bill of exceptions," and on February 29, 1868, leave was given to "withdraw bill of exceptions filed in case No. 1703, and file in this case," and again on March 7, the court granted leave to file same "in this case nunc pro tunc as of November, 1867," it was held to be too late under any view of the case.

Phillips v. Christmans, 2 Ky. Opin. 583.

When the court, by consent of the parties, extends the time for presenting a bill of exceptions to the 10th day of the month, but appellant presents it on the 8th day of the month, at a time when appellee's attorney was absent and had no opportunity to examine it, the Court of Appeals will not consider it.

Adams Express Co. v. Goodloe, 8 Ky. Opin. 182.

Where a party is allowed until a certain day to file his bill of exceptions, a bill filed on the day until which he has obtained the order is filed in time.

Miller v. Gorham's Admx., 10 Ky. Opin. 191.

§ 40.—Extension of time.

Extension of time to file a bill of exceptions must be until a day in the next term of court.

Elkin v. Skaggs, 1 Ky. Opin. 370.

The judge, during a term in which the judgment was rendered, gave the appellant until the third day of the next term to file the bill of exceptions, which was the proper time to file it.

Cooper v. Lisle, 4 Ky. Opin. 625.

It is proper for the trial judge during the term of which the judgment was rendered, to give appellant until the third day of the next term in which to file a bill of exceptions.

Cooper v. Lisle, 4 Ky. Opin. 625.

Where a bill of exceptions was signed by the judge at the term during which the judgment was rendered, and a motion for a new trial was overruled, and the bill was then made a part of the record, but the clerk omitted to make an order filing it, it was proper for the appellant at the next term, upon notice to the adverse party, to move to have an order of nunc pro tunc noting the filing.

Hamilton v. Hicks, 4 Ky. Opin. 654.

The circuit court may extend the time for filing a bill of exceptions to a day in succeeding term, but it must be filed on that day or the right to file will be lost.

Greer v. Fleming, 5 Ky. Opin. 487.

Time to prepare a bill of exceptions may be extended to the succeeding term of the court, but not beyond such succeeding term.

McLaughlin v. Avoid, 8 Ky. Opin. 256.

Under the provisions of § 364 of the Civil Code and the act of 1865 (Myer's Supplement, § 560), the time to prepare and file a bill of exceptions can not legally extend for a period of eight months; since the time for reducing to writing and filing a bill of exceptions can not be extended beyond the succeeding term of the court.

Longest v. Lyler, 9 Ky. Opin. 556.

Where a motion for a new trial was made and overruled, and time given until the next term of the court to file the bill of evidence, and at the next term another order was made extending the time of filing until the second day of an adjourned term, it was held that such last order was unauthorized, and that the appellee can not be kept in court watching the movements of his adversary for so long a time.

Thompson & Browning v. Baker, 12 Ky. Opin. 115.

A bill of exceptions is not in the record on appeal, where the motion for a new trial was overruled on July 2, 1881, and the time extended for filing the bill was extended by the court until the 17th of December, without the consent of the appellee to such extension of time.

Byers' Admr. v. Louisville, Cincinnati & U. S. Mail Line Co., 12 Ky. Opin. 478.

§ 41.—Compliance with requirements.

A bill of exceptions signed by the judge of the court, but which was not filed in the court below within the time allowed for its filing, or not filed at all, does not become a part of the record and can not be considered by the Court of Appeals.

Bush v. Commonwealth, 10 Ky. Opin. 371.

Where a bill of exceptions is presented to the court in time and offered for filing, but not filed because the judge took time to consider it, such bill is a part of the record.

Parks & Co. v. Shannon & Co., 10 Ky. Opin. 482.

§ 43.—Presentation and allowance after expiration of time.

The appellee is not bound to take notice of a tender of a bill of exceptions to the judge, and he is only bound to take such notice when such a bill is filed in the court on the day designated for such purpose; and where the record fails to show that a bill of exceptions was presented on the first day of the term, or that the time was extended to another day, the filing of the same on some other day is not notice to the appellee of its filing.

Hardin v. Hill, 10 Ky. Opin. 272.

§ 54. Procuring signatures or affidavits of bystanders.

When the judge who presided at the trial also presides when the motion for a new trial was passed upon, a bill of exceptions can not be legally certified by bystanders, as this can only be done where the judge does not preside when the motion is disposed of.

Deils v. Brown, 11 Ky. Opin. 13.

Where a bill of exceptions is signed by bystanders in November, 1880, in a case decided in December, 1879, certifying that the bill is substantially correct as well as they remember, it is too uncertain and indefinite upon which to base a judgment of reversal.

Cockrill v. Commonwealth, 11 Ky. Opin. 385.

§ 56. Certificate, signature, and seal of judge.

Where the paper copied into the transcript as a bill of exceptions is not signed by the judge nor by bystanders, it forms no part of the record.

Duncan v. Carter & Bros., 7 Ky. Opin. 261.

It is necessary not only that the judge sign the bill of exceptions, but that it shall be filed with the pleadings as a part of the record, and unless it is so filed it does not become a part of the record.

Martin v. Commonwealth, 8 Ky. Opin. 496.

§ 57. Filing.

A bill of exceptions can only be made a part of the record by the court's order, and where no order is

made as to filing a bill of exceptions, the mere memoranda by the clerk that it was filed will not make it a part of the record.

Padgett v. Mays, 11 Ky. Opin. 24.

EXCHANGE OF PROPERTY.

Exchange agreements, see Evidence, § 400.

Exchange of notes, see Bills and Notes, § 313.

Of homestead, see Homestead, § 112.

Specific performance of contract for exchange of land, see Specific Performance, § 63.

§ 9. Exchange of personal property.

Where H. and F. having traded personal property, upon demand made on F., he refused to deliver, claiming a fault in the condition of the property delivered to him, and would not deliver his property exchanged only on a payment of \$5.00, H. rightfully regarded the trade as rescinded, and recovered possession of his mare.

Fearis v. Blount, 3 Ky. Opin. 462.

EXECUTION.

II. PROPERTY SUBJECT TO EXECUTION.

§ 20. Personal property in general.

§ 21. Real property in general.

§ 24. Crops.

§ 28. Corporate stock.

§ 31. Particular estates or interests.

§ 33.—Real property.

§ 34. Property leased.

§ 36. Property mortgaged or otherwise incumbered.

§ 40. Equitable estates or interests in general.

§ 42. Interest under contracts in general.

§ 44. Interests of heirs or distributees.

§ 45. Interests of devisees or legatees.

§ 50. Ownership or possession of property.

§ 53.—Property or rights conveyed or assigned.

§ 56. Joint or several property.

III. ISSUANCE, FORM, AND REQUISITES OF WRIT.

§ 59. Jurisdiction to issue in general.

- § 75. Time for issuance.
- § 78. Form and requisites in general.
- § 81. Description of and recitals as to parties.
- § 95. Indorsements.
- § 99. Alias and pluries writs.
- § 100. Variance.
- § 105. Effect of invalidity.

IV. LIEN, LEVY OR EXTENT, AND CUSTODY OF PROPERTY.

- § 106. Nature of lien.
- § 107. Creation and existence of lien.
- § 108.—In general.
- § 112. Priorities between executions.
- § 113. Priorities between executions and other liens or claims.
- § 123. Authority to levy.
- § 124. Powers of officers in making levy.
- § 125. Time for levy.
- § 126. Mode and sufficiency of levy.
- § 127.—In general.
- § 131.—Corporate stock.
- § 138. Indorsement or entry of levy.
- § 140.—Description of property.
- § 141. Inventory and appraisalment.
- § 145. Operation and effect of levy in general.
- § 146. Waiver, release, or abandonment, and discharge or extinguishment of levy or lien.
- § 149. Custody and care of property.

V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

- § 158. Stay of execution.
- § 159. Quashing or vacating writ.
- § 161.—Grounds.

VI. CLAIMS BY THIRD PERSONS.

- § 184. Notice or demand by claimant, and affidavit of claim.
- § 187. Proceedings for establishment and determination of claims.
- § 194.—Evidence.
- § 206. Liabilities on bonds and undertakings.

VII. SALE.

(A) MANNER, CONDUCT, VALIDITY, AND CONFIRMING OR VACATING.

- § 215. Authority to sell.
- § 216.—In general.
- § 219. Mode of sale.
- § 220. Place of sale.
- § 221. Time of sale.
- § 224. Sale in parcels.
- § 226. Conduct of sale in general.
- § 228. Persons who may purchase.
- § 229. Bids.
- § 230.—In general.
- § 235. Failure to comply with bid.
- § 238.—Liabilities of bidders.
- § 243. Persons who may question validity of sale.
- § 244.—In general.
- § 246. Opening or vacating.
- § 247.—Grounds in general.
- § 250.—Inadequacy in price.
- § 256. Actions to set aside sale.
- § 257. Effect of setting aside sale.

(B) TITLE AND RIGHTS OF PURCHASER.

- § 260. Nature and effect of transfer in general.
- § 262. Property passing by sale.
- § 263. Estate or interest acquired.
- § 264.—In general.
- § 268. Liens or incumbrances on property.
- § 270. Bona fide purchasers.
- § 271.—In general.
- § 275. Effect of defects or irregularities in execution, levy or sale.
- § 276. Effect of modification, vacation or reversal of judgment.
- § 281. Rents and profits.
- § 288. Liabilities of purchasers.
- § 290. Purchasers from execution purchasers.

(C) REDEMPTION.

- § 291. Right to redeem in general.

(D) CONVEYANCE TO PURCHASER.

- § 305. Authority to make.
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(E) PROCEEDS.

- § 322. Disposition in general.

VIII. RETURN.

- § 330. Necessity.
- § 333. Time for making.
- § 334. Form and requisites.
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- § 339. Defects, objections and waiver.
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SECRET

(§ 31) 749

(831) 740

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100-101

... 8 Ky. Opin. 843.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

... Ky. Opin. 843.
... stock
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... stock is subject to
... where it is a part of
... stock the creditor
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... C. & L. R. Co.
... 447.

~~_____~~ C. & L. R. Co.,
~~_____~~ may not levy upon and
~~_____~~ delivered to a railroad
~~_____~~ placed upon its line,
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~~_____~~ a part of its
~~_____~~ C. & L. R. Co.

... or interests.

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Polk v. McCready, 5 Ky. Opin. 406.

§ 44. Interests of heirs or distributees.

Under the provisions of Act of August 25, 1862, Myer's Supp. 420, land in which heirs have a contingent interest may be sold under a judgment.

McDowell v. Butler, 6 Ky. Opin. 201.

§ 45. Interests of devisees or legatees.

Whether and interest of a devisee in real estate is vested or contingent, it is vendible and subject to sale to satisfy its owner's debts.

Overton v. Means, 11 Ky. Opin. 1.

§ 50. Ownership or possession of property.

§ 53.—Property or rights conveyed or assigned.

Where, at the time a creditor subjected land to the payment of his debt, the legal title was not in the debtor, the sale passed no title to the purchaser, since a sale under execution was not the proper means of subjecting the land.

Shropshire v. Pryor, 6 Ky. Opin. 722.

§ 56. Joint or several property.

Where the evidence shows that one not holding the legal title to real estate has paid a part of the purchase-money and is interested in it as part owner his interest may be reached and subjected to pay his creditors.

Stirman v. Gates, 13 Ky. Opin. 1059.

III. ISSUANCE, FORM, AND REQUISITES OF WRIT.

§ 59. Jurisdiction to issue in general.

An execution can not properly issue from a judgment which has been reversed.

Commonwealth v. Shanks, 6 Ky. Opin. 79.

When an execution is shown against a defendant in possession and he surrenders land to satisfy it, no judgment need be shown as to him, however a judgment is essential to uphold the sale and conveyance of an adversary title.

Ard v. Walker, 3 Ky. Opin. 226.

§ 75. Time for issuance.

A failure for seven days to issue an execution after it might have issued by an assignor is not such delay as to release the assignor of liability.

Young v. Edwards, 5 Ky. Opin. 333.

The failure to issue an execution for ten days after it might have been done is such want of diligence as will exonerate the assignor; and the proof of insolvency, when the execution was delivered to the sheriff, cannot dispense with diligence in issuing it.

Oliver v. Bruce, 2 Ky. Opin. 302.

Injunction will be issued to prevent execution on a judgment standing without execution for more than seven years, in the absence of a valid excuse for failure to have an execution during such time.

Lynn v. Lynn, 8 Ky. Opin. 70.

Where no execution has been issued on a judgment for more than seven years, under the provisions of Rev. Stat., chap. 97, § 12, no execution may lawfully issue.

Lynn v. Lynn, 8 Ky. Opin. 70.

One who has not used diligence who procured a judgment on October 24, and did not cause execution to issue thereon until December 8, unless he can show some good reason why execution was not sooner issued.

Wilson v. Gallagher, 10 Ky. Opin. 155.

One who does not cause execution to issue for more than five months after a judgment is rendered fails to prosecute to insolvency with the diligence required by the law in order to hold the assignors bound on their assignment.

Perry & Co. v. Duke's Exr., 11 Ky. Opin. 29.

Where it is agreed between parties to a cause that no executions are to issue on certain bonds (and by consent of parties the agreement is placed of record by the court) until certain questions are decided by the Court of Appeals in another case pending on appeal, the parties are precluded from issuing any executions until the case is finally disposed of in the Court of Appeals, since such agreement, when recorded by the court, becomes a judgment on order and no executions will issue until the Court of Appeals has finally ruled on a motion for a rehearing in the preceding cause before it.

Park v. Cline, 13 Ky. Opin. 580.

§ 78. Form and requisites in general.

The recitals in an execution that it was issued on a replevin bond is not evidence of the existence of such bond, which bond is a quasi judgment.

Moss v. Moss, 5 Ky. Opin. 464.

§ 81. Description of and recitals as to parties.

An execution and sale not describing the land so it could be identified is defective and void.

Frazer v. Merrell, 8 Ky. Opin. 33.

§ 95. Indorsements.

It is the duty of the clerk issuing an execution to indorse his release of the surety, where the bond and execution gives him the data to act upon.

Jones v. Daviess, 1 Ky. Opin. 484.

§ 99. Alias and pluries writs.

Where a note has been executed in settlement of an execution, and the execution has been "satisfied" by order of the judgment plaintiff, the judgment plaintiff can not nullify the settlement and have a new execution issued on the ground of mistake in the amount due, without first vacating

the sheriff's return and canceling the note given in settlement.

Goodin v. Sellers & Tate, 6 Ky. Opin. 162.

A creditor who has had an execution returned "no property found," may have another levied on the interest of his creditor in partnership property and may thereafter enforce his lien by a suit in equity.

Miller v. Gray, 2 Ky. Opin. 101.

§ 100. Variance.

Where the variance between the replevin bond and an execution consisted in the name "Minor & Dallam" and "Minor and Sallamon," it constitutes ground for quashing the execution or bond.

Horn v. Minor & Dallam, 7 Ky. Opin. 166.

§ 105. Effect of invalidity.

A venditioni exponas directing the sheriff to sell property illegally levied on by the jailer was also illegal.

Owens v. Hudson, 1 Ky. Opin. 298.

IV. LIEN, LEVY OR EXTENT, AND CUSTODY OF PROPERTY.

§ 106. Nature of lien.

Where prior liens on land outside of the homestead have been created by levy of execution, there is no equitable principle by which these liens in favor of subsequent creditors can be made subordinate to antecedent debts.

Jameson v. Jameson's Admr., 5 Ky. Opin. 55.

§ 107. Creation and existence of lien.

§ 108.—In general.

Where the appellants, in the court below, fail to produce or require the appellee to file all the executions which have been issued, the presumption of an execution lien arising from the undenied allegations and proof that the writ of venditioni exponas had been issued to sell the land, must be held to be sufficient evidence of a legal levy on it which operates as a lien.

Jackson & Gillispie v. Shackelford, 2 Ky. Opin. 142.

The levy of an execution by a jailer when it is directed to the sheriff is void.

Owens v. Hudson, 1 Ky. Opin. 298.

If the sheriff holding an execution levies on personal property he has a lien, and such lien is not divested by an agreement by which the sheriff permits the defendant to hold and sell such property to pay such lien, and the officer and owner of the execution are not liable to the defendant or his estate for any part of such proceeds except such as exceed the same due such a plaintiff.

Williams' Admr. v. Gates, 10 Ky. Opin. 582.

The conveyance of real estate by the owner will not destroy a lien created by an execution.

Murphy v. Hambleton, 10 Ky. Opin. 742.

§ 112. Priorities between executions.

The law requires that sheriffs shall first satisfy the scire facias which comes first to his hands, and when two or more executions come to his hands at the same time, he shall apportion the sum made among the several executions according to the amount realized.

James v. Stone, 4 Ky. Opin. 634.

§ 113. Priorities between executions and other liens or claims.

An execution creditor holding a subordinate lien on a crop can only sell it subject to the landlord's lien for the payment of the amount of rent discharged by replevin.

Alexander v. Paxton, 1 Ky. Opin. 315.

A judgment creditor can not, by the levy of his execution on land, acquire any preference over one who, before the execution was issued, had an equitable lien upon the land.

Boswell v. Kerby, 12 Ky. Opin. 412.

§ 123. Authority to levy.

If a judgment and the execution thereon are void, the execution gives to the sheriff no authority to take a replevin bond, and it can not be made the basis of another execution, and a sale under execution on such replevin bond is void.

Merrett v. Moss, 5 Ky. Opin. 596.

§ 124. Powers of officer in making levy.

The sale of land by a sheriff, under an execution formerly levied by the jailer is illegal and void.

Harris v. Vanarsdall, 3 Ky. Opin. 156.

A sale made by a sheriff, upon levy made after the return day, is void.

Harris v. Vanarsdall, 3 Ky. Opin. 156.

§ 125. Time for levy.

The sheriff has no power to make a levy on an execution in his hands after the date when a return is required by the law to be made thereof, but he may make a sale after return day, where the levy is made before return day.

Aloes v. Abbott, 9 Ky. Opin. 822.

The sheriff holding an execution may make a levy thereon either on or before return day, and may legally make sale thereon after return day.

Aloes v. Abbott, 9 Ky. Opin. 822.

§ 126. Mode and sufficiency of levy.**§ 127.—In general.**

As the law does not furnish the sheriff with the power or the means to go on land upon which he may levy and make surveys thereof, he must act on the best information he can otherwise obtain, and when he has done so he can not be made responsible for the mistake of others.

Central Nat. Bank of Danville v. Bailey, 5 Ky. Opin. 186.

If an execution had been so levied on J., as to authorize a sale, a venditioni exponas addressed to a sheriff of a different county would not authorize the caption or sale of J. after he had gone to M. county from F., where the levy purported to have been made; the only legal process to take and sell him by execution being a new fieri facias to M. county.

The Philadelphia Bank v. Rice, 1 Ky. Opin. 254.

Where there are two bonds executed for the purchase-money, upon sale of bond at sheriff's sale and both bonds are due and executed by the same parties and payable to the same person,

one execution may be executed on both for the entire amount due.

Poor v. Hudson, 11 Ky. Opin. 753.

§ 131.—Corporate stock.

Where a sheriff has wrongfully attached part of the debtor's property, in the levy of a subsequent execution he should proceed as if no attachment had issued.

Tucker v. Helm, 7 Ky. Opin. 205.

§ 138. Indorsement or entry of levy.

It is not essential to the validity of the levy of an execution that it shall be indorsed on the execution, and a sheriff may sell under a levy so made, to the exclusion of an execution levied at later date, notwithstanding the levy was indorsed on the latter one.

Steel v. Commonwealth, 5 Ky. Opin. 437.

§ 140.—Description of property.

The fact that the conveyance describes the property can not cure a levy that is void for want of description.

Johnson v. Rowe, 10 Ky. Opin. 682.

§ 141. Inventory and appraisement.

Where an officer levies on personal property claimed by a third party he must appoint appraisers to appraise the property, and the claimant may refuse to give the required bond until the officer takes such action.

Hudson v. Stone, 8 Ky. Opin. 844.

§ 145. Operation and effect of levy in general.

Where the sheriff has made no levy, notwithstanding he has promised to make the debt out of one of the debtors, he may legally enforce the levy upon the estate of the other debtor, and he is not liable on any such a promise.

Jones v. Spencer, 10 Ky. Opin. 803.

§ 146. Waiver, release, or abandonment, and discharge or extinguishment of levy or lien.

Notice to an execution debtor, of a discharge of a levy, without a bond of indemnity being forthcoming, given at 12 o'clock on the day of sale, is insufficient.

Powell v. Barley, 2 Ky. Opin. 622.

If the sheriff has, in good faith, reasonable doubt as to the liability of property to the execution, he has no right to release the levy, without reasonable notice to the execution debtor that he would not sell without a sufficient bond.

Powell v. Barley, 2 Ky. Opin. 622.

Where one has a lien on land for his execution debt and the land is sold on his execution, he can not legally have a lien on the equity of redemption, since the first sale exhausts his lien, and in order to sell the equity of redemption it would be necessary to make another levy, and where before he does so another creditor levies on the exemption he becomes prior in right to the execution plaintiff who caused the land to be first sold.

Glazebrook & Bro. v. Brandon, 11 Ky. Opin. 355.

§ 149. Custody and care of property.

It is the duty of a sheriff to take into his possession goods levied upon, and if the property is such that he may not do so he should place it in charge of some person for whose action he is willing to be responsible.

Commonwealth v. Taylor, 8 Ky. Opin. 105.

V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

§ 158. Stay of execution.

A surety in a supersedeas bond, to stay execution on a judgment against a principal and sureties on a note, who had taken indemnity from the principal, is held to have executed the supersedeas as the principal above, and could not, by paying the debt, acquire any right of remuneration from the original sureties.

Lear v. Ray, 4 Ky. Opin. 380.

§ 159. Quashing or vacating writ.

The consolidation of several motions to quash the same execution sale, for several causes, is proper.

Harris v. Vanarsdall, 3 Ky. Opin. 156.

Where a sale is made under different executions, all the parties to be affected by a motion to quash the

sale should be notified of the motion, and the irregularity of restricting the notice to the parties to the separate execution is not cured by an order or consolidation, as the purchaser of the equity of redemption was a necessary party.

Harris v. Vanarsdall, 3 Ky. Opin. 630.

Where two execution creditors levied on and sold the same property of defendant B, and appellant creditor filed suit, charging improper motives, etc., of the other execution creditor, and on motion of defendant the sale under execution of appellant was set aside, April 6, 1869, and the sale under the execution of the other creditor was set aside April 14, 1869, and appellants filed an amended petition alleging that by virtue of their said levy, they acquired a lien by answer, set forth claim by virtue of levy of execution on the same property at a different time, for another and different debt; under volume 1, Sess. Acts 1867-8, p. 18, amending § 1, art. 16, ch. 36, Rev. Stat., appellant's lien, acquired by his levy was not affected by the quashal of the sale thereunder.

Hirsch, Flexner & Co. v. Bourne, 4 Ky. Opin. 529.

The fact that the time to redeem land sold under an execution has expired, does not affect the right of the execution debtor to have the sale set aside for irregularities, where the right of redemption has been sold under another execution before the time to redeem under the first sale has expired.

Graves v. Thompson, 5 Ky. Opin. 678.

A mere motion to quash an execution, the motion having been overruled and nothing else appearing in the record is not such a judgment as will bar a proceeding in equity to enjoin the collection of the executions upon the grounds of payment even if the relief asked for was one of the grounds set forth in the motion to quash.

Sayer v. Samuel, 5 Ky. Opin. 796.

A motion to quash an execution may be made when an execution has been irregularly issued, but issued against

the wrong party, or upon a different judgment, or upon a defective sale bond, or by reason of some other defective proceeding.

Sayer v. Samuel, 5 Ky. Opin. 796.

Where a sale of land is made under an execution, pending a suit to vacate the deed to the property under which the defendant in the execution holds title, and the case is thereafter decided in his favor, the sale will be set aside if the property sold at a sacrifice, for the reason that the pendency of the suit affected the value of the property and had a tendency to prevent others from bidding for it.

Polk v. McCready, 5 Ky. Opin. 406.

§ 161.—Grounds.

A motion to quash either an execution or a replevin bond taken under it should not be sustained for immaterial variance, but if the variance is of such a material character as to render it uncertain from the records whether an execution was in fact intended to apply to the judgment rendered and relied on to uphold it, or whether the bond sought to be quashed was taken under some other execution, or without authority of the sheriff, the execution or bond may be quashed.

Horn v. Minor & Dallam, 7 Ky. Opin. 166.

VI CLAIMS BY THIRD PERSONS.

§ 184. Notice or demand by claimant, and affidavit of claim.

A proceeding by a claimant of property in the hands of a constable to prevent the sale of the property, should be by notice and motion on the bond as provided by § 716, Civ. Code.

Hawkins v. Dean, 6 Ky. Opin. 511.

§ 187. Proceedings for establishment and determination of claims.

§ 194.—Evidence.

Where an officer holding an execution makes a levy on property seized as the property of the execution defendant, such property is prima facie subject to such seizure, and one claiming to own such property has the burden of proof and the right to open and close.

Stone v. Hudson, 9 Ky. Opin. 857.

§ 206. Liabilities on bonds and undertakings.

An officer may require an indemnifying bond before he levies an execution, and unless he does so and notifies the execution plaintiff that he desires such bond, it is his duty to levy, and he may waive such bond until he does levy, or entirely, if he desires, and the deputy may do this as well as the sheriff.

Lucas v. Temple & Barker, 1 Ky. Opin. 259.

The effort of a judgment creditor to make his debt by causing another execution to issue, after the sheriff failed to execute the former one, will constitute no defense for the officer to an action against him for his official delinquencies.

Broadus v. Tuggle, 2 Ky. Opin. 352.

In the absence of proof or notice that property levied on under an execution belongs to other than the execution debtor, the sheriff has no right to require an indemnifying bond.

Powell v. Barley, 2 Ky. Opin. 622.

In a proceeding by a plaintiff in execution to recover upon a claimants' bond, he was only entitled to recover the amount at which the property was appraised and ten per cent. thereon, and it was error in the court to render judgment for a greater sum.

Combs v. Wallace, 11 Ky. Opin. 338.

VII. SALE.

(A) MANNER, CONDUCT, VALIDITY, AND CONFIRMING OR VACATING.

§ 215. Authority to sell.

§ 216.—In general.

Land can not be sold under an execution on a judgment from a quarterly court.

Benton v. Jameson, 1 Ky. Opin. 179.

Where a sheriff levies an execution on property before the return day, he may sell it afterward without a venditioni exponas.

Jennings v. Jennings, 1 Ky. Opin. 611.

If there are such irregularities in the proceedings out of which an execution sale is made as to render the sale void, the purchaser must tender back the property within a reasonable time after the discovery of the irregularities or offer a good and sufficient reason for not making the tender, before he is entitled to a rescission of the contract.

Daniel & Scott v. Southern Bank of Kentucky, 1 Ky. Opin. 402.

Where an execution has been issued from a state court, and a levy made prior to the filing of a petition in bankruptcy, and the property sold after the petition is filed, the lien of the levy and the title of the purchaser is good, especially where no steps were taken by the assignee or the bankrupt to prevent a sale or to have the matter litigated in the bankrupt court.

Adams v. Williams, 10 Ky. Opin. 97.

If the sheriff has an execution, and thereunder levies on land of the defendant, he may, after the return day, while the execution is in his hands, sell the property taken by virtue thereof, provided the levy was made before the return day.

Adams v. Chestnut, 13 Ky. Opin. 471.

Where land has been conveyed by the owner before judgment or execution against him, and the grantee is not a party thereto a sale of such land upon execution to satisfy such judgment is void and conveys no title.

Morse v. Barclay's Admr., 9 Ky. Opin. 320.

The sheriff can only legally sell as much of the debtor's land as will make his debt, interest and costs, and when he sells more he exceeds his authority, and such sale passes no title.

Stephens v. Jones, 9 Ky. Opin. 654.

§ 219. Mode of sale.

The statute only authorizes the sale of lands under writs of fieri facias in satisfaction of judgments of replevin

bonds, which have the force of judgments.

Minor v. Clarkson, 1 Ky. Opin. 389.

In the absence of fraud or collusion, mere irregularities of the sheriff in conducting a sale will not render the sale void, as such irregularities do not affect the purchaser, and where the sheriff exceeds his authority the sale is void, but his failure to follow the law carefully is a mere irregularity.

Sayers v. Hahn, 12 Ky. Opin. 313.

§ 220. Place of sale.

Where the return of the execution shows that the land in question was sold in front of the court-house door, and the proof shows that the court-house had been destroyed by fire, and that the sale was made in front of a hotel which was being used as a court-house, there is no such irregularity in the return as to render the sale void.

Perry v. Lacy, 6 Ky. Opin. 45.

§ 221. Time of sale.

As an officer, by § 1, art. 6, ch. 36, Rev. Stat., 475, is authorized to sell, after the return day, under an execution, whilst it still remained in his hands, a fortiori, he may sell under a venditioni exponas.

Bryan v. Wade, 3 Ky. Opin. 213.

Where an execution is issued and a levy made by the sheriff, but no effort is made to sell the property in a reasonable time, the execution plaintiff should proceed against the sheriff, and where such plaintiff fails to pursue such a remedy within a reasonable time, other creditors may refuse to recognize the first execution.

Tate v. Elliott, 8 Ky. Opin. 806.

§ 224. Sale in parcels.

It was the duty of the sheriff to sell the several lots of land separately as they were separated by distinct metes and bounds and containing not less than fifty acres and the written direction to sell the real estate instead of personal property, conferred no authority to sell the land as one tract.

Graves v. Thompson, 5 Ky. Opin. 678.

§ 226. Conduct of sale in general.

Where the execution defendant is not present at the sale, the sheriff has the right to designate out of which portion of the tract he will sell.

Treadway v. Gray, 7 Ky. Opin. 37.

§ 228. Persons who may purchase.

Where plaintiffs in a suit were the purchasers at execution sale, they will be presumed to know of the release of a surety on a replevin bond executed by defendant.

Bell v. Cross, 7 Ky. Opin. 523.

§ 229. Bids.**§ 230.—In general.**

It is the duty of the sheriff to make known to the bidders the nature of the interest of the defendant in the property offered for sale on execution, and a failure to do so will render him and his sureties liable to a purchaser for damage sustained because of the existence of prior liens on the property.

Jackson, Saving & McGoodwin v. Perkins, 9 Ky. Opin. 843.

While a sheriff can not legally bid in property sold by him as sheriff, it is not a violation of the law for him to bid for a litigant who has written to him a bid for the amount of such litigant's claim, since under such facts the bid is made by the party and not by the sheriff.

Mullins v. Buskirk, 12 Ky. Opin. 413.

§ 235. Failure to comply with bid.**§ 238.—Liabilities of bidders.**

The fact that the surety on the bond given by the purchaser of land at an execution sale was insolvent in immaterial, where the judgment plaintiff has acknowledged satisfaction of the judgment.

Devitt v. Wilson, 6 Ky. Opin. 55.

§ 243. Persons who may question validity of sale.**§ 244.—In general.**

The fact that the defendant in the execution was present and orally consented to the sale did not import to it legal validity, nor authorize the sheriff to convey to the purchaser.

Lowry v. Young, 4 Ky. Opin. 420.

As appellant recognized the appellees' official character and right to levy on the property, the nonproduction of his official bond and oath of office is not reversible error.

Hicks v. Duggins, 4 Ky. Opin. 41.

A sale of real estate on execution on a decree entered in a case to which the owners of the land were not parties is void as against such owners.

Bradley v. Nelson, 12 Ky. Opin. 17.

§ 246. Opening or vacating.**§ 247.—Grounds in general.**

Where land is levied upon as the property of Ball and sold as the property of Baugh, the irregularity, while furnishing ground to quash the levy, does not render the levy and sale void, and could not be taken advantage of in a collateral proceeding.

Frazer v. Merrell, 8 Ky. Opin. 33.

Motions to quash sales under execution will be sustained and the sales be quashed where the officer sells for a greater sum than he is required by the *fi. fa.*

Hope v. Hollis, 12 Ky. Opin. 287.

§ 250.—Inadequacy in price.

Mere inadequacy of price paid at a sheriffs' sale will not affect the purchaser, nor will a mere irregularity of the sheriff unless the purchaser participates in it in some manner.

Sayers v. Hahn, 12 Ky. Opin. 313.

§ 256. Actions to set aside sale.

Evidence of inadequacy of price, and the interest of a purchaser as an heir and acting trustee for several other heirs, is sufficient to vacate the sale of a large tract of land appraised at \$3,200, and sold under execution for \$144.

Craig v. Hawes, 2 Ky. Opin. 625.

Where a private sale, under an execution levy, is made, and no proof, in a subsequent action, that this sale produced as much as a public sale, it is error for the court to refuse an instruction, "that such a sale was a breach of the sheriff's bond and made him liable to this action for whatever damage resulted to Powell, from failing to make public and official sale of the horses."

Powell v. Barley, 2 Ky. Opin. 622.

§ 257. Effect of setting aside sale.

Where a sheriff's sale of land on execution is set aside because illegal, but the purchaser pays his bid and had possession under his purchase, the court should adjudge that the interest on the money should be set off against the rent of the land from the date of the purchase.

Stephens v. Jones, 9 Ky. Opin. 654.

(B) TITLE AND RIGHTS OF PURCHASER.**§ 260. Nature and effect of transfer in general.**

The only effect of a sale of land under a writ of venditioni exponas is that it operates to credit the judgment by the amount of the bid.

Pearce, Tolle & Co. v. Burns, 7 Ky. Opin. 433.

To make out title to land sold on execution, it is necessary to exhibit both the judgment and execution.

Carlisle v. Carlisle, 9 Ky. Opin. 167.

§ 262. Property passing by sale.

Where, under an execution against A and K, the land of K was pointed out to the officer, who levied on and sold same, and afterward A claimed the land as his, and refused possession, though the levy was on the land as belonging to K, the title of both A and K passed by the officer's sale and execution.

Ard v. Walker, 3 Ky. Opin. 226.

Where land is levied upon and sold by the sheriff, all that as a matter of law constituted a part of the land was embraced in the levy and sale, and the legal effect of the sheriff's return could not be enlarged or restricted by parol evidence, and in such a case the return is conclusive on the parties to the writ.

Kinnaird v. Shannon, 10 Ky. Opin. 212.

Where a levy is made on 500 acres of land and a sale is made on it of 800 acres, the purchaser can get no title except to 500 acres, and it will not be presumed, and proof will not be admitted to show, that the levy was

on the entire tract of 800 acres, since the levy of the execution contradicts any such conclusion.

Martin's Assignee v. Martin, 11 Ky. Opin. 195.

§ 263. Estate or interest acquired.**§ 264.—In general.**

Where at the time of the sale and purchase under execution, the grantees of an equitable owner of the land were in possession, and the deed of the conveyance by the equitable owner was registered, the purchaser at execution sale obtained nothing more than he would have acquired by purchase from the former equitable owner.

Crutchfield, Exr., v. Spray, 7 Ky. Opin. 639.

A purchaser of land at an execution sale becomes substituted to the rights of the creditors, in a subsequent suit to assert claim to the land by assignment of a title bond.

Dunn v. Conn, 3 Ky. Opin. 195.

It is error to issue a writ of possession for more land than that sold under the judgment, and to that extent it may be enjoined.

Cooper v. Griffin, 5 Ky. Opin. 3.

The rights of a purchaser at an execution sale become vested at the time it is made and they can not be divested nor impaired by subsequent litigation between the plaintiff and defendant.

Johns v. Woodson, 5 Ky. Opin. 536.

By the sheriff's sale to M, the equity of the intestate in the land passed, and by the transfer to B of M's purchase, B acquired the equity, and when G paid B for it, she, in equity, was substituted to all his rights.

Goode's Admr. v. Goode, 5 Ky. Opin. 657.

Where the purchaser of land before execution sale had actual notice, when he purchased, that L had some claim upon the land, and the proof shows that L's deed to the land was of record, and that the land was in the actual possession of one claiming under L, it was gross negligence in the purchaser to buy without investigating the title.

Lee's Admr. v. Hood, 6 Ky. Opin. 187.

Where, pursuant to a judgment and execution, one's real estate is advertised for sale, and a third party agrees to buy the property at such sale and hold it for the judgment debtor, and to convey it to him upon the repayment of the amount paid, with interest at ten per cent., such purchaser does not become the owner of such property, but holds a lien upon same, and can not collect ten per cent. interest on his claim because usurious, but he is entitled to recover the sum advanced and six per cent., and to enforce his lien.

Arnold v. Dressman, 9 Ky. Opin. 574.

The purchaser of land at sheriff's sale on levy and execution in order to obtain a good title is not required to furnish other evidence than such as is shown by an execution levy and return filed in the proper office followed by a regular and fair sale; and he is not responsible for the loss of the execution by which the holder of a subsequent mortgage lien claims to have been deprived of notice of the levy and consequent lien, as he has a right to rely on the preservation of the records by their proper custodian and their loss or destruction will not affect his rights thereunder.

Greer v. Howard, 11 Ky. Opin. 755.

One who buys land at an execution sale, with notice that the execution debtor has conveyed the land, secures nothing by such a purchase, and the fact that such deed has not been recorded is immaterial, where he has notice or knowledge.

Commonwealth v. Gibson, 13 Ky. Opin. 44.

Where the execution plaintiff purchased the equity of redemption, and the judgment is subsequently reversed on appeal, he takes nothing under such sale and purchase.

Shultz's Assignee v. Beatty, 13 Ky. Opin. 319.

Where A retains a lien on land in a deed conveying it to B, and B thereupon conveys it to his wife, and A does not seek to enforce his reserved lien but sues B for the debt, and on execution being levied on the land sells

same and buys it, these circumstances can in no way affect the ownership or possession of B's wife who became the record owner of it before judgment was taken against her husband.

Cheny v. Smith, 13 Ky. Opin. 651.

§ 268. Liens or Incumbrances on property.

Under § 1, art. 13, ch. 36, R. S., if the legal title is in the execution defendant, a mere outstanding creditor's lien on the land will not restrict the purchaser's right to a lien for the price paid and ten per cent. interest thereon.

Kirkman v. Grissom, 7 Ky. Opin. 140.

§ 270. Bona fide purchasers.

§ 271.—In general.

An attempt to levy upon land situated in one range, where the levy and return show a levy upon land in another range, is no levy as against an innocent purchaser for value, and such levy and return can not be corrected so as to affect the rights of an innocent purchaser.

Buckwalter & Campbell v. Bartlett, 10 Ky. Opin. 747.

§ 275. Effect of defects or irregularities in execution, levy or sale.

However inadequate may be the price at which a defendant purchased land at an execution sale, he will be entitled to hold the land under the sheriff's deed, made after the right of redemption expired.

Cartmell v. Kibby, 3 Ky. Opin. 161.

Where a sale was made for a grossly inadequate price, for the exact amount of the execution levied, and both parties regarded that the debtor had a right to redeem the land, it constitutes a mortgage and not an absolute, unconditional sale.

Parker v. Milton, 3 Ky. Opin. 694.

§ 276. Effect of modification, vacation or reversal of judgment.

Where a constable sold property under execution, and appellant elected to sue in trespass for the value of the property in which he obtained judgment against the constable, he can not maintain an action against

appellee who obtained possession by purchase under the execution.

Seber v. Nelson, 5 Ky. Opin. 101.

§ 281. Rents and profits.

Where land is about to be sold at the instance of a creditor, and the owner procures another to bid it in and give him time to redeem it by repaying the money thus advanced, and several payments are made but no redemption or final settlement had, in a suit against the estate of the person buying the land and holding the legal title for a settlement, where it appears that the original owner has had the continuous possession of the land, he should be charged with the reasonable value of the rents.

Hale's Admr. v. Powell, 13 Ky. Opin. 1006.

§ 288. Liabilities of purchasers.

Where a judgment is rendered, and pending a motion for a new trial, but before it is decided, an execution is issued and property of the defendant levied upon and sold by the officer, who took a sale bond for the price of the sale, after which the motion for a new trial is granted and the judgment set aside, such sale bond is rendered void, and if an execution is issued upon it the collection may be enjoined, and property of the defendant purchased on execution under a judgment should be returned to him when the judgment is set aside.

Baker v. Hampton, 10 Ky. Opin. 575.

Where one in good faith buys at sheriff's sale a tract of land represented to contain 150 acres, and the tract contains only 90 acres, equity will give him relief, and he will be permitted to withhold deferred payments equal to the value of the land he did not receive.

Elder v. Lucas' Exr., 11 Ky. Opin. 47.

§ 290. Purchasers from execution purchasers.

The purchasers of a portion of land sold, from the execution purchaser, for a valuable consideration, without notice of the equity of co-heirs, can not be divested of their holdings, in a subsequent suit by such heirs.

Craig v. Hawes, 2 Ky. Opin. 625.

(C) REDEMPTION.

§ 291. Right to redeem in general.

The right of an execution defendant to redeem land sold under execution, can not be established by parol evidence of the execution defendant alone.

Shropshire v. Offut, 7 Ky. Opin. 646.

(D) CONVEYANCE TO PURCHASER.

§ 305. Authority to make.

A deed made by a deputy sheriff should be made in the name of his principal, but when made in the name of the deputy it is not invalid for that reason; and such a deed is admissible in evidence to show that the grantee entered and held under claim of title, and is competent evidence of title.

Boyd v. Mercer, 10 Ky. Opin. 590.

The sale of real estate by one sheriff and deed executed by his successor in office is valid.

Davis' Assignee v. Smallgood, 11 Ky. Opin. 441.

§ 309. Form and contents.

§ 310.—In general.

A deed of the sheriff to a person in her individual capacity on an execution issued in a proceeding in which as administratrix she is plaintiff is not invalid for that reason, and the question as to whether she thereby held as trustee is one that can not arise between her and persons not interested in the estate.

Poor v. Hudson, 11 Ky. Opin. 758.

§ 311.—Recitals.

Where a sheriff's sale of real estate is alleged to have taken place in 1872 and no conveyance was made thereunder until 1877, long after the sheriff had gone out of office, and there is no record or evidence of it showing the sale except the recital in the sheriff's deed and no record showing that the sheriff ever made any return on the execution if one was issued, the recitals in such a deed are not evidence, as against the owner, that any sale was made, and where less than fifteen years have elapsed since such alleged sale no presumption will arise that the officer did his duty, and the

burden is on the defendant to show that the plaintiff's title has been divested.

Spragins v. Russell, 11 Ky. Opin. 717.

(E) PROCEEDS.

§ 322. Disposition in general.

Where a sheriff overpays one of several execution creditors and the money realized from the sale is not sufficient to satisfy all the executions he is responsible to the other creditors in proportion to the amount over-paid.

James v. Stone, 4 Ky. Opin. 634.

If a sheriff undertakes to make what in his judgment is an equitable apportionment between execution creditors he is liable on his official bond for error.

James v. Stone, 4 Ky. Opin. 634.

Though heirs, holding an equity in land sold under execution, are estopped from recovery of the land, they can by proper proceedings force restitution of the amount obtained by the sale of the lands to such bona fide purchasers.

Craig v. Hawes, 2 Ky. Opin. 625.

Creditors alone are concerned in the distribution of the proceeds of a sale under execution.

Sutherland v. Ullman, 2 Ky. Opin. 674.

When a sheriff collects money on an execution on the defendant's property, he has no right to appropriate a part of the money to the payment of taxes due by the defendant, leaving plaintiff's debt unsatisfied. No levy had been made by him for such taxes; besides, it appears that the defendant had other property sufficient to satisfy the taxes.

Brown & O'Bryan v. Ballard, 10 Ky. Opin. 874.

VIII. RETURN.

§ 330. Necessity.

It is the duty of sheriffs to return all executions in their hands within the prescribed time after the return day thereof, and for a failure to do so they subject themselves to such dam-

ages as plaintiffs might sustain therein.

Jennings v. Jennings, 1 Ky. Opin. 611.

§ 333. Time for making.

The mistake of the clerk of the court in issuing an execution returnable at the wrong time did not affect its validity.

Frazer v. Merrell, 8 Ky. Opin. 33.

The sheriff is required to return the *fi. fa.* within thirty days after the return day, but it is held to be a reasonable excuse for not doing so that within that time the sheriff left it with the clerk for record, under the belief that the law required the return thereon of "No sale for want of bidders" to be recorded where the delay in its return was caused by the failure of the clerk to record it.

Farmers' Bank of Kentucky v. White, 10 Ky. Opin. 654.

§ 334. Form and requisites.

A return of nulla bona by reason of an assertion of a prior lien, gives to a court of equity jurisdiction to clear the title, it not being material to the judgment debtor whether the lien claimed was right or not.

Sutherland v. Ullman, 2 Ky. Opin. 674.

A return of nulla bona before proceeding may be dispensed with in a suit in equity against an administrator and his sureties, who are jointly bound for him.

Hughes v. Gray, 1 Ky. Opin. 1.

§ 336.—Description of property.

A return of levy and sale of real estate under execution is void for uncertainty, which shows that he "levied on 1,500 acres of land given up by John Stafford," since the land so described can not be identified, and a levy and sale thereunder is void.

Stafford v. Campbell, 8 Ky. Opin. 533.

A description is held sufficient to identify real estate levied on, which is as follows: "Levied this *fi. fa.* on the individual one-half interest in a house and lot of ground in the city of Henderson, being part of lot No. 8, corner Third and Water streets;

levied on as the property of L. M. Grafton, the same being given up to be sold by L. M. Grafton," etc.

Watson v. Turner, 12 Ky. Opin. 258.

§ 338. Amendment.

A sheriff can not legally amend his return on an execution made more than three years after the original endorsement, to enable the sheriff to collect his half commission by reason of his having levied the execution before the judgment on which it was issued was suspended.

Smith v. Burbridge's Committee, 10 Ky. Opin. 944.

§ 339. Defects, objections and waiver.

A sheriff's return while in office, under sanction of the official oath, will not be disturbed, under his affidavit, after he went out of office, some four years later, because the date as mentioned was erroneous.

Sweeney & Taylor v. Mill, 3 Ky. Opin. 570.

§ 340. Quashing or setting aside.

Where the levy of an execution on land and the sale thereunder has been quashed, the sheriff's return on the execution should also be quashed.

Bogie v. Moore, 6 Ky. Opin. 4.

Where there has been no return of nulla bona, a plaintiff can not come into equity and attempt to subject defendant's property to his judgment, and where he has had a return on his execution showing the execution to be satisfied in full, he can not have another execution until he has procured the former return to be set aside.

Lindsay v. Fuqua, 9 Ky. Opin. 828.

Before the sheriff's return showing sale of real estate can be corrected or set aside by one shown by the return to be a purchaser, the proof ought to be so clear as to satisfy the mind that the purchase was made without authority.

Bell v. Bellew, 12 Ky. Opin. 24.

§ 341. Construction.

The return of an indemnifying bond, with an execution, on the day it was

made returnable, is a sufficient compliance with the law.

Felts v. Covington, 3 Ky. Opin. 675.

§ 342. Operation and effect.

The creditor's right to resort to equity does not depend on the truth of the return of the officer, but upon the fact that the execution has been returned "No property found," and such return is conclusive between the parties, and its verity can not be inquired into without making the officer a party.

Durret v. Bouche, 5 Ky. Opin. 667.

Where plaintiff acts in good faith, but the sheriff makes return of summons served when in fact it was not served, the return is conclusive against defendant.

Ferguson v. Hume, 3 Ky. Opin. 289.

The return of an execution, "no property found," is only prima facie evidence of insolvency, since such a return will not lay the foundation for the interposition of the court to make provision for a wife, out of the effects of the husband without other evidence, allegation or prayer for that purpose.

Stewart v. Lyon, 3 Ky. Opin. 314.

In the absence of an express stipulation in an execution from the court, as to a sale for "cash," the return of the sheriff that the sale was made for cash, is presumptive evidence that he did not exceed his authority.

Barker v. Hundley, 4 Ky. Opin. 374.

The sheriff's return on an execution that he has made a sale of the property and taken bond from the purchaser is prima facie evidence of the fact, but in an action on his official bond for failure to take a sale bond, it is incumbent on him to prove that fact, where the bond is lost or misplaced by him.

Commonwealth v. Rothwell, 5 Ky. Opin. 251.

§ 344.—Conclusiveness.

Where a sheriff's return shows that the sale was duly advertised and made at the door of the court-house, and states the date upon which the sale

was made and notice given, and shows that the purchaser was the highest and best bidder, such facts are all that are necessary for those claiming under his deed to establish by record evidence.

Treadway v. Gray, 7 Ky. Opin. 37.

Where an officer makes a return on an execution, "that he had collected said debt," it is conclusive of the fact upon him and his sureties.

Brown v. Wells, 1 Ky. Opin. 456.

§ 347. Failure to make.

If a sheriff entrusts the custody of an execution issued to him to others, their laches can not afford him any excuse for his failure to levy and return the execution.

Green v. Lexington, &c., R. Co., 7 Ky. Opin. 521.

A plaintiff in an execution is entitled, on motion, to have a judgment for the amount thereof and 30 per cent. damages, where a sheriff fails to return the execution for thirty days after the return day thereof.

Gwynn, Snoddy & Co. v. Tinsley, 1 Ky. Opin. 38.

Where a constable fails, without excuse to return an execution for more than thirty days after the return day thereof, the remedy is by motion or suit on his bond, in the court in which the execution issued, and the criterion of damages is 30 per cent. of the amount of the execution.

Brown v. Wells, 1 Ky. Opin. 543.

While the execution was in force and after it had been paid, it was held up by instruction of the plaintiff; under the circumstances it was a sufficient excuse for the failure to return the execution.

Boyd v. Lester, 1 Ky. Opin. 455.

The fact that an execution debtor is insolvent will absolve an officer from liability for the debt, but it cannot relieve him from the penalty for failure to return the execution.

Commonwealth v. Hudson, 2 Ky. Opin. 27.

Where an execution was placed with a sheriff a few days before his term expired, and given into the hands of his deputy who was retained in office

by the new sheriff, upon failure by the deputy to make return in thirty days, the sheriff then in office is liable on his official bond.

Dugan v. Commonwealth, 3 Ky. Opin. 287.

A petition averring the issuance of an execution, its going into the hands of the sheriff, after the teste and before the return day, its collection and failure to return within thirty days after it expired, is sufficient to make the defendant prima facie liable.

Dugan v. Commonwealth, 3 Ky. Opin. 287.

Where the plaintiff takes an execution out of the hands of the sheriff he can not complain on account of its not being returned.

Boyd v. Stion, 4 Ky. Opin. 280.

X. SUPPLEMENTARY PROCEEDINGS.

§ 371. Jurisdiction and authority of court or judge.

Where an execution is issued on a judgment and is returned "No property found," the chancellor has jurisdiction in the proceeding supplemental to execution.

Lampton v. Lewis, 10 Ky. Opin. 622.

§ 373. Proceedings for examination of debtor.

§ 374.—Grounds in general.

One called upon to make discovery and to disclose the extent of his right and interest under his father's will should state the facts and take necessary steps to enable the court to determine his rights, and where he fails to do so and judgment is taken against him he must abide the result of his own neglect to make a more complete discovery.

Overton v. Means, 11 Ky. Opin. 1.

§ 379.—Service of order and affidavit.

Where a judgment has been rendered on notes, and a vendor's lien adjudged and the land sold thereunder, and the proceeds of the sale fail to satisfy the judgment, and the judgment creditor seeks to collect the balance of his debt by proceedings supplemental, he must serve defendant with process; and where no pro-

cess has been issued a judgment in such proceeding is void, the proceeding being entirely separate from the former one, and hence no jurisdiction over the person of the defendant is acquired by the process in the former action.

Dameron v. Osenton, 12 Ky. Opin. 723.

§ 420. Defects and irregularities in proceedings, and waiver thereof.

Where a personal judgment has been taken against a debtor and a return made of no property found, in a proceeding thereunder to discover and subject property to the payment of the judgment, it is error for the court to pronounce a second personal judgment.

Farmer v. Porch & Cook's Assignee, 12 Ky. Opin. 633.

XII. WRONGFUL EXECUTION.

§ 454. Nature and grounds of liability.
§ 459.—Wrongful or excessive levy.

Where after a judgment is entered for \$1,300 against a defendant he pays \$747.78 on it, but an execution is issued for the full amount of the judgment and the sheriff is about to sell the defendant's land for the debt, the defendant is entitled to have an injunction to prevent the sale of the whole of his land and the collection of the whole amount of the judgment should be enjoined.

Beatty v. Curtis, 11 Ky. Opin. 768.

§ 462. Persons liable.

The party who wrongfully procured an execution to be issued and who received the amount collected, is primarily responsible; but if he is insolvent the clerk is liable for the entire amount improperly collected.

Pryor v. Commonwealth, 4 Ky. Opin. 180.

§ 472.—Damages.

Where appellant as clerk issued a second execution on a judgment at the instance of another party, notwithstanding the first one had been returned satisfied, as shown by the records of his office, and it is not shown that the clerk acted corruptly, he is only liable for the actual dam-

ages sustained by reason of his wrongful act.

Pryor v. Commonwealth, 4 Ky. Opin. 180.

EXECUTORS.

Competency of, see Executors and Administrators, § 15.

EXECUTORS AND ADMINISTRATORS.

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Subrogation of administratrix for money advanced, see Subrogation, § 10.

When payment to administrator is payment to heirs, see Payment, § 5.

I. ADMINISTRATION IN GENERAL.

§ 5. Fact of intestacy.

A testator is deemed to have died intestate as to particular property not specifically alluded to by will, a reversionary interest of which had not been disposed of by any other clause of the will.

Wharton v. McFerrin, 1 Ky. Opin. 325.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 15. Competency of person named as executor.

An executor who is a devisee in a will can not hold as devisee and claim against the will.

Graves v. Motherhead, 7 Ky. Opin. 212.

§ 20. Proceedings for appointment.

It will be presumed that an administrator executed bond with good surety; and, therefore, without an averment that the surety would be unavailable, no cause of action can be made out by the distributees against the administrator, even if such case existed in behalf of the sureties.

Trible v. Ellison, 1 Ky. Opin. 59.

It is irregular for the county court to grant letters of administration of two estates in one order and appoint one administrator of both estates and require of him but one bond; however, the action of the court in doing so was not void, and the bonds-

men in such bond are bound by the conditions of the bond.

Higdon v. Potter's Admr., 9 Ky. Opin. 374.

§ 26. Bond.

When the burnt record of a will and the probate thereof is supplied in the county court by oral testimony, the same court has jurisdiction either to supply, in the same way the executor's bond executed at the time of the probate, or to take a new bond with the same or other sureties.

Luckett v. Beavon, 4 Ky. Opin. 402.

The new bond thus taken binds its sureties to pay all legacies; and it is therefore immaterial whether the amount of the legacy was collected since or before the date of the new bond.

Luckett v. Beavon, 4 Ky. Opin. 402.

The fact that a party appeared in court and on his motion was appointed administrator de bonis non, and executed bond with certain persons as sureties thereon, amounts to a sufficient approval of the court of the bond, and makes it binding on the parties.

Curds, Admr., v. Curds, Exr., 6 Ky. Opin. 442.

It is not necessary that the record of the county court with reference to the qualification of an administrator and the execution of his bond, should contain the words "approved by the court" in order to make it a valid statutory bond.

Curds, Admr., v. Curds, Exr., 6 Ky. Opin. 442.

An executor has no power to act until he is qualified as such by taking an oath and giving bond in the court in which the will or a copy thereof is admitted to record.

Murrell v. Wing, 6 Ky. Opin. 667.

Where executors are named by a will and by the same will the same persons so named are also named as trustees of one of the legatees, and give bond as executors but give no bond as trustees, the sureties on such exe-

cutors' bond are not liable for their defalcation or negligence as trustees.

Warren v. Benton's Trustees, 11 Ky. Opin. 272.

While an administrator may not be authorized to collect rent on real estate of the intestate, and hence his bondsmen will not be liable on account thereof, if he does collect the rent he is liable for it, and rents so collected do not belong to a purchaser at administrator's sale, since his right to collect the rent begins only when the sale is confirmed.

Elliott's Admr. v. Bush, 11 Ky. Opin. 354.

§ 29. Operation and effect of appointment.

Where an administrator of an estate has been appointed upon the showing of the death of an intestate, the court will presume that such person is dead, unless satisfactory proof to the contrary is shown.

Higdon v. Potter's Admr., 9 Ky. Opin. 374.

§ 31. Termination of authority in general.

The marriage of an administratrix divests her of such representative capacity, but does not deprive the estate or its representative of the right of appeal.

Shercliff v. Cooper, 5 Ky. Opin. 774.

Upon the marriage of an executrix, her power over the entire estate ceases, since being under the legal control of her husband she in legal contemplation has no discretion or power independent of him.

Honaker v. Honaker, 5 Ky. Opin. 543.

§ 36. Death.

It is well settled that an administrator of an administrator does not represent the first estate, and the only grounds upon which an action can be maintained is upon the allegation that the executor de son tort took possession of the first estate.

Carter's Admr. v. Brummell's Exr., 4 Ky. Opin. 617.

§ 37. Administrators de bonis non.

When the county court has appointed an administrator de bonis non

of an estate, he has exhausted his power, and can not make an order on a day thereafter appointing a co-administrator.

McLeod's Admr. v. Ament's Admr., 8 Ky. Opin. 151.

An administrator de bonis non not interested in the estate as an heir or creditor has no sufficient interest in the funds to be allowed to raise a question as to whether the former executor had proper authority to use a part of the trust funds to enclose the graveyard where the decedent is buried.

McLeod's Admr. v. Ament's Admr., 8 Ky. Opin. 151.

III. ASSETS, APPRAISAL, AND INVENTORY.

§ 38. Property constituting assets in general.

The accumulations upon the farm of her late husband by the widow, by her labor and that of her children or those employed by her, do not become a part of the estate.

Allen v. Allen, 12 Ky. Opin. 150.

§ 39. Real property and estates and interests therein.

Lands of a decedent are not assets in the hands of the administrator.

Reynolds v. Nelson, 1 Ky. Opin. 523.

§ 48. Debts and rights of action.

§ 49.—In general.

If a vendor of land die before the payment of the purchase-money it passes to his personal representative and becomes a part of the assets of the estate.

Smith's Admx. v. Smith's Admr., 12 Ky. Opin. 729.

§ 53. Exempt property.

A widow, who has no children left by her deceased husband, is entitled to her exemption, and the fact that she failed to demand said exemption when the appraisement was made did not release the administrator from the responsibility incurred by taking and selling the property, it being his duty to cause the exempted articles to be set apart to her.

Chism v. Chism, 2 Ky. Opin. 461.

§ 62. Appraisal and inventory.

Where an administrator de bonis non has acted improperly in not filing an inventory of what came into his hands, and thereby failing to preserve the evidence of a debt due by himself to his decedent, all reasonable presumption should be taken against him.

Noland v. Elkins, 2 Ky. Opin. 144.

IV. COLLECTION AND MANAGEMENT OF ESTATE.

(A) IN GENERAL.

§ 83. Discovery and collection of assets.

An administrator de bonis non can not be compelled to accept a refunding bond taken by an executor and thereby discharge the legatees from liability incurred by their testator as executor.

Tucker's Exrs. v. Crawford's Admr., 3 Ky. Opin. 411.

Section 471, Civ. Code, does not require an administrator to take refunding bonds from a creditor whose claim he may settle thereunder.

Miller's Admr. v. Miller's Creditors, 3 Ky. Opin. 538.

An executor has no right to demand payment in anything else than legal tender.

Coons v. Coons' Exr., 4 Ky. Opin. 663.

§ 86.—Collection and protection of assets in general.

An administrator should not be charged with fee-bills, unless it appears that they were collected, or that the parties were solvent, lived in the county, and they should have been levied and made as provided by law after they came into the hands of the administrator.

Curd v. Mix, 6 Ky. Opin. 332.

Executors must properly protect the debts due their testator's estate, and, on a note of an insolvent, where no attempt is made to properly secure it, or ask for a pro rata allowance out of the assigned property of a surety, or actual demand of the principal, it is held to be a violation of the trust.

Evans v. Hord, 2 Ky. Opin. 636.

Debtors of a deceased have the right to demand that the person seeking to coerce payment of the debts shall show that he is legally entitled to collect them, and he can not be deprived of such right by the unauthorized action of the county court having no jurisdiction of the matter.

Murrell, Exr., v. Wing, 6 Ky. Opin. 667.

Under Act of Congress providing for the raising of troops for the civil war, in case of a soldier's death in the service, all bounties or arrearage of pay and allowances due at the time of his death pass to the widow, if any; if not, to his children; if no children, then to his heirs at law, and not to his personal representative.

Avery v. Carter, 7 Ky. Opin. 307.

An executor is required to exercise reasonable diligence in the collection of debts owing the estate.

Graves v. Motherhead, 7 Ky. Opin. 212.

Where a testator sells and conveys real estate to his son-in-law, taking notes for a part of the purchase money, which are unpaid at the death of the testator, he can not by will dispose of such real estate again to the daughter of such son-in-law, and where there are no creditors or legatees interested, and the son-in-law waives his right to such real estate and permits his daughter to take it, the executor has no right to collect such purchase money notes.

Ryan's Admr. v. Logston, 9 Ky. Opin. 754.

Where the sheriff makes a levy on property, and the execution defendant agrees, if allowed to keep it, that he will sell the same and pay over the proceeds to the sheriff for the holder of the judgment, and makes the sale but dies before the property is paid for, the administrator may not force the officer or the holder of the judgment to pay over such proceeds to him.

Williams' Admr. v. Gates, 10 Ky. Opin. 582.

§ 87.—Compromise or release of claims.

An administrator ought not to be charged with a fee-bill which he failed to return to the clerk's office, if he can show that the parties owing it were insolvent.

Curd v. Mix, Admr., 6 Ky. Opin. 332.

Where free-bills have not been returned by the administrator, he should be allowed to show that the parties liable thereon were insolvent.

Curd v. Mix, Admr., 6 Ky. Opin. 332.

§ 88.—Debts due from executor or administrator.

When an executor qualifies, all right of action on debts due from him to his testator is suspended, and he must be held chargeable with the amount in his fiducial account, and it is held a cancellation of his individual liability; but, if he should not charge this liability and cease to be executor, a right of action revives.

Bush v. Bush, 1 Ky. Opin. 201.

§ 90. Custody and management of estate.

An administrator was held to be the proper custodian of money due his intestate's estate, and where by agreement between the widow, life tenant, and the remainderman, the land was sold, it was the duty of the administrator to tender the widow a bond with good security, and to receive and hold the portion of the money due the estate.

Sale v. Snyder, 6 Ky. Opin. 592.

Regardless of whatever good faith an administrator may have shown in the management of the estate he will be liable for his acts in transcending his legal powers and duties.

Roper's Heirs v. Roper's Exrs., 3 Ky. Opin. 343.

An executor may make an agreement for the support of the widow, and is entitled to credit, on settlement, for the amount so paid.

Cralle v. Marshall, 5 Ky. Opin. 41.

§ 95. Contracts.**§ 96.—In general.**

Before an estate can be held liable

on a new contract by a personal representative about a new matter with which the decedent had no connection, it must clearly appear that the estate has been benefited by it.

Sublett's Exr. v. Brookie, 10 Ky. Opin. 465.

§ 97.—Services.

An administrator who, under a mistaken belief of his right to do so, collects money for the hire of a slave and appropriates it to the payment of the debts of the estate and does so without collusion with the heirs, is individually liable and the heirs are not liable therefor.

Story v. Harrison, 11 Ky. Opin. 669.

§ 101. Investments.**§ 102.—In general.**

While an administrator has no right to invest personal assets in real estate, he may do so when it is the only means of saving a debt due to the estate.

Jones' Admr. v. Shy's Admr., 8 Ky. Opin. 890.

Where a testator directs his executors to invest certain moneys bequeathed to named legatees "in some safe investment yielding interest, * * * that the executors shall exercise their best judgment in making the investment," it was held that such executors could invest such money in real estate improved and such as will yield an income.

Bedford v. Harper's Admr., 9 Ky. Opin. 100.

§ 106. Loans.

An administrator will not be required to loan money out, when, because of litigation, he might be required to account for it at any time.

Lyles v. Mathews, 6 Ky. Opin. 678.

§ 116. Fraud.

A petition by a distributee, against an executor and another alleging a combination to defraud the estate by a misappropriation of the assets, in the absence of the disclosure of the plaintiff's interest, not set forth, a demurrer thereto was properly sustained.

Burgess v. Owens' Exr., 3 Ky. Opin. 319.

§ 117. Waste, conversion, or embezzlement of assets.

An action for devastavit against an administrator can only be brought by the distributees, and not by the administrator de bonis non.

Nevitt's Admr. v. Chandeon, 4 Ky. Opin. 537.

§ 118. Loss of assets.

An administrator who, through laches, loses to the estate assets, through a sale of personal property not authorized by the will or court, will be held personally liable therefor.

Roper's Heirs v. Roper's Exrs., 3 Ky. Opin. 343.

It is the duty of an executor in taking sale notes to act with the same prudence and vigilance as is to be expected of a prudent man in the management of his own affairs, and when he thus acts, and from the real and personal property in possession of men signing a sale note, he believes them responsible for the amount of said note, and he accepts it, his inability to collect the note will not prevent him from taking credit for the amount of the note in final settlement.

Conrad v. Conrad's Exrs., 10 Ky. Opin. 53.

An administrator, not guilty of bad faith, to be relieved from liability or loss in managing the estate entrusted to him, is only required to exercise such care as a competent person would ordinarily exercise under the same circumstances in reference to his own affairs.

Messmore v. Stone, 13 Ky. Opin. 304.

§ 119. Torts.

Where one legatee takes possession of an estate but does not qualify as executor, he is liable, if at all, only for conversion, if he fails to account for the interests of other legatees; however, where one who takes possession of such an estate and promises another legatee that he will pay her the value of her interest, such a promise may be enforced.

Threlkeld v. Duerson's Admr., 10 Ky. Opin. 752.

§ 120. Administrators de bonis non.

Before an administrator de bonis

non is chargeable with an uncollected claim of the estate for failure to collect it, it should appear not only that the party owing the debt is solvent, but that a fee-bill could have been levied upon the property of the debtor.

Curd v. Mix, Admr., 6 Ky. Opin. 332.

Fee bills returned to office by administrator should be treated as accounts unadministered, and passed to the administrator de bonis non, and the administrator should not be charged with them, unless it is shown that while they were in his hands they could have been collected, and that their return to the office has resulted in a loss to the estate by reason of insolvency of the parties.

Curd v. Mix, Admr., 6 Ky. Opin. 332.

§ 121. Administrators with will annexed.

Where a judgment establishing a claim against an estate has been entered in a foreign state, it will be final here, unless there is some defense offered that did not exist in the state where entered; and the holder of such a judgment can not be required to establish his claim here, but his claim consists of the sum adjudged due him in the judgment.

Underwood's Exr. v. Burton, 8 Ky. Opin. 462.

(B) REAL PROPERTY AND INTERESTS THEREIN.**§ 129. Title and authority in general.**

An administrator has no control over the land of his decedent; such land descends to the heirs, and when one of the heirs is indebted to the decedent his interest in such land is liable to be sold to pay such indebtedness.

Hall v. Harris' Admr., 8 Ky. Opin. 831.

§ 131. Rents and profits.

Where the rent of an estate is made by public sale to the highest bidder, the distributees can not be heard to complain of a discrepancy of amount, they being present and not filing an objection or exceptions thereto.

Taylor v. Figg, 3 Ky. Opin. 446.

§ 136. Sale.

Where an executor has power under the will to sell and convey real estate, he may complete by conveyance any sale made by the testator and his deed will vest the purchaser with a perfect title to the land.

Grubbs' Exr. v. Satterfield, 5 Ky. Opin. 662.

§ 137.—Authority and duty in general.

An administrator with the will annexed held authorized under the circumstances to sell the land in controversy.

Rutherford's Heirs v. Clark's Heirs, 6 Ky. Opin. 326.

§ 138.—Power under will.

The sale of land by an executor was held to be a substantial compliance with the terms of the will fixing the time of sale.

Lester v. Winfrey, 6 Ky. Opin. 121.

When a will directs the sale of real estate but names no one to make it, the executor has the power to do so.

Shaugherssey v. Huffman's Admr., 8 Ky. Opin. 713.

After a will directing the sale of land is probated, and before the probate of such will is annulled upon the appeal of those contesting its validity, it is legal for the executor to sell the land as directed by the will, and such sale will be upheld.

Mattingly v. Lee's Admr., 8 Ky. Opin. 215.

Where the testator directs his executors to lay out and purchase real estate for a named person and the lawful heirs of her body, and such person does not apply for the appointment of trustees to manage such estate, the executors have discharged their duty when they have purchased such real estate and had it conveyed as directed by the will, and it is error for the court to direct that the real estate so purchased be conveyed to trustees.

Wells v. Offutt's Exrs., 9 Ky. Opin. 335.

Where a will empowers an executor to sell real estate and the executor

became the purchaser at his own sale, he can not be heard to question the power to sell, some two years after the sale, merely because he has become dissatisfied with his purchase.

Scott's Exr. v. Scott, 10 Ky. Opin. 196.

Those entitled to the proceeds of land devised to executors to be sold may, before a sale, elect to take the land and thus defeat the power of sale.

Bryan v. Lowry, 10 Ky. Opin. 588.

§ 143.—Validity.

It is the claim of the creditor and the liability of the debtor, and not the judgment against the administrator, that may be enforced against the fraudulent grantee of the intestate.

Alexander & Lancashire v. Quigley's Exrs., 1 Ky. Opin. 230.

§ 150. Lease.

Where the evidence preponderates in favor of voluntary surrender of rent notes by a testator, and gives the tenants the use of the land another year without taking notes therefor they can not be held liable for rent in a suit, by the administrator against them as heirs.

Miller's Exr. v. Miller's Heirs, 3 Ky. Opin. 679.

§ 152. Property acquired by executor or administrator.

Where an administrator who was appointed commissioner to sell land of the estate, purchased the land at the sale, and afterwards sold it at an advance over the price paid by him, he will be held to account for the excess of the price received over the price paid by him.

O'Bryan v. O'Bryan, 6 Ky. Opin. 346.

(C) PERSONAL PROPERTY.**§ 153. Title and authority in general.**

Where personal property is absolutely transferred to a testator's widow, the legal title at her death passed to her administrator, who alone could make a transfer of it.

Lair v. Keys, 1 Ky. Opin. 599.

The title of personal property of an intestate vests in his personal representative as soon as he qualifies, and it becomes his duty upon appraisal, to set aside to the widow or infant children articles of personalty exempted from distribution, and the widow in such a case has no cause of action to recover property not thus set aside for her.

Green v. Wilson, 8 Ky. Opin. 636.

Upon the appointment and qualification of an administrator of an intestate the title to all the goods, chattels, and credits of the intestate vests in such administration; but certain articles of such property are exempt from sale, and may be set apart by the appraisers to the widow or infant children; but until this is done the exempted property is not identified, and the title to all of it remains in such administrator.

Williams' Admr. v. Cambest, 10 Ky. Opin. 553.

A chose in action accruing to a wife during coverture survives to her husband and does not pass to her personal representatives.

DeCoursey's Admr. v. Dickens, 10 Ky. Opin. 660.

Where one executed to his children certain writings, each alike promising to pay a certain sum to each of the children by way of advancement, but not to be due or payable until after the death of the father except at his option, said father on the same day making and publishing his will reciting the execution of said writings and describing each and directing that said sums should be paid out of his estate, but providing that if any of said children should die without issue his share should go to the remaining brothers and sisters, and one dies without issue during the lifetime of the father, her administrator can recover nothing on said writing, since it is to be construed with the terms of the will, and hence belongs to the brothers and sisters of the deceased daughter and not to the administrator.

Hackley's Admr. v. Kelly's Admr., 12 Ky. Opin. 523.

V. ALLOWANCES TO SURVIVING WIFE, HUSBAND, OR CHILDREN.

§ 173. Nature and purpose in general.

Where intestate made a contract with appellee to board his wife and child during the time he should remain in the army, from September, 1861, the time he left, until he died in December, 1862, his estate was bound for the reasonable price for the board of the wife and child until his death, but after that time his widow was responsible out of her own estate for the board of herself and child, but she could charge the estate of her infant son with a reasonable sum for his maintenance.

Parrish's Admr. v. Cowles, 5 Ky. Opin. 574.

§ 175. Quarantine or other occupation or use of property.

A widow is entitled to one-third of the rents of her husband's real estate from his death until her dower is assigned, and she may hold the dwelling house, yard, garden, stable and stable lot and orchard, but has no right to use or cultivate free of rent any other part of the real estate.

Jones v. Jones, 11 Ky. Opin. 412.

§ 177. Specific articles.

Though the rents from a deceased's estate including the mansion house may amount to more than the wife's one-third of the rental value of the whole estate, she can not be deprived of the rents to her exclusively from the mansion house, since she is entitled to hold that and curtilage without charge until her dower may be assigned her.

Arnold v. Brehmer, 2 Ky. Opin. 510.

The widow may sell timber from her deceased husband's land in order to purchase work-stock to cultivate the farm.

Myers v. Roundtree, 1 Ky. Opin. 175.

A widow is entitled to hold the mansionhouse without charge until dower is assigned, and whether she occupies the premises or rents them out is

not material, as she has a right to the rents and profits.

Russell's Admr. v. Russell's Heirs, 1 Ky. Opin. 95.

§ 180. Persons entitled.

An administrator having been brought into court, is entitled to be allowed all valid claims against the estate paid by him, including his own.

Yancey's Admr. v. Foreman, 7 Ky. Opin. 158.

VI. ALLOWANCE AND PAYMENTS OF CLAIMS.

(A) LIABILITIES OF ESTATE.

§ 202. Obligations of decedent in general.

Upon the death of one having a claim against a personal representative, the claim of the decedent passes to the personal representative of the deceased and should be asserted by the representative of the deceased.

Higdon v. Beck, 7 Ky. Opin. 126.

§ 202½. Personal contracts.

A demand against a decedent's estate arising after death is not embraced in the provisions of § 35, Art. 2, ch. 371, I. R. S., p. 509.

Garvey's Admr. v. Garnett, 5 Ky. Opin. 696.

§ 204. Services rendered to decedent.

A claim for personal services rendered a decedent in his lifetime was held properly allowed, and dismissal of the claim properly refused for want of a demand.

Yancey's Admr. v. Foreman, 7 Ky. Opin. 158.

§ 206.—Persons in family relation.

The law will not imply a promise to pay for services of a daughter and her husband rendered to the daughter's parents, while living with them, but where such services are rendered with the expectation of being paid, and the parent, knowing this, fails to notify them of his intention not to pay for such services, the law will imply a promise on the part of a parent to pay what such services are reasonably worth.

Mitchell's Admr. v. Cannon, 9 Ky. Opin. 260.

Where a niece and her husband open their home to a sick relative who has a cancer, and care for her and look after her welfare and board, and entertain her friends, under an agreement that they are to be paid for their services, such services are not to be regarded as rendered for the same compensation as would be received by a hired nurse, and where the rights of creditors are not involved the court will allow such niece and her husband a liberal compensation for such care and services.

Parrish v. Ferguson's Admr., 12 Ky. Opin. 444.

§ 212. Taxes.

An administrator is not liable for taxes on real estate of deceased.

Hunter v. Hunter, 7 Ky. Opin. 235.

§ 213. Claims barred by limitation.

The statute of limitations does not run against the personal claim of an administrator, after his appointment.

Rause v. Deacon, 4 Ky. Opin. 219.

The presumption is that after the lapse of five years from the grant of administration no debt will come against an administrator, and if under the statute he should be liable, a judgment of the court requiring him to pay the assets to its receiver would discharge him from liability, and a refunding bond is therefore not necessary.

Winfrey's Admr. v. Griffin, 5 Ky. Opin. 338.

§ 214. Funeral expenses.

Where a testator appoints an executor and directs him to manage the business of the late partnership between himself and such executor, and to pay off the firm debts, and directs his executor while managing the partnership to liberally support the testator's widow, and the widow soon thereafter dies, the executor should pay all her funeral expenses, and those holding obligations on which the decedent is bound as surety can not successfully resist such claims.

Rogers v. Burbridge, Committee, 13 Ky. Opin. 517.

§ 215. Tombstones and monuments.

Where an estate is insolvent, the executor is not permitted to make

an expenditure of \$575.00 in buying a tombstone to mark the grave of the testator, and such claim should not be allowed the executor as a credit.

Rogers v. Burbridge, Committee,
13 Ky. Opin. 517.

§ 219. Claims of executors or administrators.

As against a claim asserted by an administrator in a settlement suit, the heirs may set off rent for the land.

Million's Admr. v. Holeman, 7 Ky.
Opin. 640.

At common law an administrator has the right to retain in his hands the amount due him by the deceased, where there are no other creditors, and no statute deprives him of such right.

McGregor v. Kelthby & Co., 6 Ky.
Opin. 489.

When an administrator, in the final settlement, shows that he has honestly paid out more than the cash received, he is entitled to recover from the estate such excess payments, with interest from the date of the confirmation of the report of his settlement with the county court.

Webb v. Childs, 9 Ky. Opin. 568.

§ 221. Evidence.

Where a person has been dead five years, and no administration has been had of his estate, there is a strong presumption that he owed no debts, or that the creditors had abandoned their claims, or that his heirs had paid the debts without administration.

William v. McMahon & Mattingly,
9 Ky. Opin. 631.

(B) PRESENTATION AND ALLOWANCE.

§ 222. Necessity for presentation in general.

In an action by an administrator to settle the estate of the deceased, a creditor does not have to set up his claim against the estate by answer or other pleading, but he may present his side to the commissioner by vouchers as required by statute.

Dollins v. Perry, 5 Ky. Opin. 763.

It is the duty of a claimant, before commencing an action against a personal representative, to demand payment and accompany it with proof of the account as well as his own affidavit.

McKnoll v. Wear's Admr., 1 Ky.
Opin. 447.

§ 223. Statutory provisions.

Even though an obligation provides for the payment of interest, an act of the legislature is valid which provides that unless an obligation is proven and filed against an estate within one year no interest shall be allowed.

Caudell v. Crowser's Admr., 9 Ky.
Opin. 310.

§ 225. Time for presentation.

The effect of a court order preventing creditors from instituting suits at law to collect their claims against an insolvent estate does not deny to them the right of collecting their claims in the manner provided by the statute for the settlement of decedent's estates, and where they fail to present their claims properly verified within the statute of limitations their claims are barred by such statute.

Barnes v. Green, 11 Ky. Opin. 235.

Under the statute providing that no interest accruing after the death of the decedent shall be allowed unless the claim be verified and proven as required by law, and demand be made of the representative within one year after his appointment, a demand is rendered unnecessary where the administrator files a petition for a settlement within the year, and a commission is called on to adjust the accounts; the presentation of the claim being to the court or the commissioner, and not to the representative.

Hamilton's Admr. v. Tarlton, 11
Ky. Opin. 371.

§ 227. Statement and verification of claim.

Where an administrator, when a claim had been presented to him, declared his intention not to pay it, he thereby waived any right to require a literal compliance by the claimant with the statute, and invited litigation thereon, and can not complain that

plaintiff did not duly comply with the statute in presenting the claim.

Parsons v. Gartrell's Admr., 6 Ky. Opin. 180.

In a suit for specific property against an administrator, no affidavit as to the justness of the claim is required.

Page's Admr. v. Page, 1 Ky. Opin. 385.

Though an executrix can not, as such, maintain an action on a note made payable to her testator as executor; unless the petition is demurred to, or objection made in their answer, defendants will be deemed as having waived the objection.

Scott v. Scott's Exrs., 2 Ky. Opin. 639.

Previous settlements are prima facie evidence of the correctness of the various vouchers filed therein, and before they will be rejected by the court, if there are any affidavits other than the claimants as to the justness of the act and a receipt therefor, it should be made to appear by the parties surcharging the settlement that the credit was improperly allowed for the reason that it was not owing, or that the administrator had a valid defense thereto.

Curd v. Mix, Admr., 6 Ky. Opin. 332.

Where claims against an administrator are sustained by affidavits of witnesses as to their correctness, and presented by the claimants, and allowed the administrator in settlement by the county commissioners, they will not, after six or seven years, be rejected for want of proof, unless their validity is successfully assailed and a state of case presented showing that the administrator ought not to have paid them.

Curd v. Mix, Admr., 6 Ky. Opin. 332.

Where claims against an estate are authenticated by sworn statements of witnesses and claimants, they ought not to be rejected, especially after they have been allowed in a county court.

Curd v. Mix, Admr., 6 Ky. Opin. 332.

No interest accruing after his death will be allowed against decedent's estate, unless the claim is verified and demand made of the executor or administrator within one year after his appointment.

Griffin's Exr. v. Barnes, 8 Ky. Opin. 783.

The statutes requiring that claims filed against deceased persons shall be sworn to do not apply to claims filed by the state in a proceeding to enforce the criminal or penal laws and recover on an appearance bond because of a failure to appear.

Arnold's Exrs. v. Commonwealth, 11 Ky. Opin. 515.

§ 228. Presentation and filing.

Where there are written evidences of debt on the part of the decedent, and they are filed as vouchers and have been credited, in a county court settlement, with the receipt of the claimant, they should be allowed.

Curd v. Mix, Admr., 6 Ky. Opin. 332.

The affidavit of appellee that the account, sued on, against decedent was just and fair and included no usury, and that there were no just set-offs, and the affidavit of a disinterested witness that it was just, substantially conformed to the requirement of the statute.

Sebree v. Sebree's Admr., 3 Ky. Opin. 622.

§ 234. Allowance by executor or administrator.

The personal representative must be furnished with a proper voucher by which he can obtain credit in his settlement.

McKnoll v. Wear's Admr., 1 Ky. Opin. 447.

Where a claim of a married woman has been allowed by the administrator and not questioned either by him or the heirs in a proceeding to sell real estate to pay debts, to which they were parties, they will not be allowed in a petition for a settlement of the estate to question its validity.

Huffstetter v. Moore, 8 Ky. Opin. 286.

§ 235. Allowance by commissioner.

An allowance by a commissioner of a credit for administration of the principal of a trust fund, against the account due the residuary legatee thereof, without necessary allegations in a cross-petition by an adverse party that said fund should be charged against said devisee, is erroneous.

McGill v. Nelson, 2 Ky. Opin. 344.

(C) DISPUTED CLAIMS.**§ 242. Contest of claims in general.**

If a voucher against a decedent's estate is made out and proven according to law, this does not preclude the executor from contesting it, and where an issue is formed, the ex parte statements made in the form of an affidavit can not be read without the consent of the parties.

Stivers' Admr. v. Potter's Admr., 5 Ky. Opin. 99.

§ 248. Trial by probate court.**§ 252.—Evidence.**

If proof of a claim can only be made by the personal representative, and he refuses to make the affidavit, further proof is dispensed with.

McKnoll v. Wear's Admr., 1 Ky. Opin. 447.

The mere admission of the correctness of a demand by a representative does not bind his successor in office so as to dispense with proof.

McKnoll v. Wear's Admr., 1 Ky. Opin. 447.

§ 255. Judgment.

A judgment against an administrator is only evidence of the facts which constitute the claim against the testator.

Alexander & Lancashire v. Quigley's Exrs., 1 Ky. Opin. 230.

A judgment against an administrator can not be regarded as sufficient evidence against the grantee of the intestate that he was justly indebted to the plaintiff in the sum adjudged to him.

Alexander & Lancashire v. Quigley's Exrs., 1 Ky. Opin. 230.

(D) PRIORITIES AND PAYMENT.**§ 263. Rights of creditors to priority.**
Statement of order of payment of claims against estate.

Bunham v. Foughn, 7 Ky. Opin. 115.

A debt payable out of general fund is not a preferred debt.

McElroy v. Palmer, 4 Ky. Opin. 577.

No part of the testator's estate is subject to pay the individual debts of the widow and executor, who is the devisee of all the estate after the debts thereof are paid, since the testator's debts must first be paid.

Milton v. McCloskey's Exr., 12 Ky. Opin. 388.

§ 265. Claim of executor or administrator.

Where the whole estate of the intestate is in the hands of the court's receiver, an administrator of the estate can not retain out of the fund an amount owing him by one of the distributees, because the same was not in his hands; and the principle of retainer does not apply.

Jarboe's Admr. v. McLane, 1 Ky. Opin. 474.

§ 267. Interest.

Where there are several obligors on a note and the note provides for ten per cent. interest, which at its date the law permitted, and one of the obligors dies, his estate is only liable for six per cent. interest after the maturity of the note or after judgment, while the interest to be collected from the living obligors will be ten per cent.

Snelling's Admr. v. Atchison, 13 Ky. Opin. 1057.

Under Gen. Stat. 1883, ch. 60, art. 1, § 5, only six per cent. interest can be collected from one's estate, even though the contract called for a greater rate, but if there are other living obligors on the same obligation, payments of interest, according to the contract, may be collected from them, provided the rate is not prohibited by the statute.

Snelling's Admr. v. Atchison, 13 Ky. Opin. 1057.

§ 276. Effect of payment.

A payment by an administrator to the court's receiver of funds in his hands belonging to the estate will completely exonerate him and his sureties.

Fore's Admr. v. Fore's Heirs, 1 Ky. Opin. 498.

§ 277. Time for making payment in general.

Where, after the death of the father, his son and heir died, and the administrator of the father's estate was also appointed as administrator of the son's estate, and the son was largely involved and the father was his surety for several thousand dollars, and the administrator brought a suit to settle both estates and procured an order for the sale of the father's real estate to pay such obligations and others, it was held that the other heirs, being before the court, and the action having been properly instituted, the chancellor should have proceeded to ascertain the amount of the personal estate and applying that to the payment of the debts, he should then have sold enough of the real estate to pay the balance of said indebtedness and have divided the balance of the estate between the children, charging the deceased son's estate with what the father's estate had to pay for him, and all this should have been done before the son's creditors received anything.

Carter v. Carter's Admr., 11 Ky. Opin. 940.

§ 284. Deficiency of assets in hand.

Where an administrator has exhausted the personal estate in the payment of debts in full, and the proceeds of real estate are insufficient to give a claimant his pro rata portion of the whole estate, the administrator must account to him, and in case of deficiency, make up the deficit.

Bunham v. Foughn, 7 Ky. Opin. 115.

§ 287. Liability to refund.

An executor is not compelled to plead the statute of limitations, even if such a defense can be made; and where he pays a claim justly due, a

claimant can not be required to refund the money.

Maxey v. Wallhatt's Exrs., 11 Ky. Opin. 31.

VII. DISTRIBUTION OF ESTATE.

§ 288. Authority and duty to make in general.

Where an executor insists that the words, "with usual payments," mean such payments as were usual at the time of the death of the testator, and the devisees contend that these payments are to be regulated by the sale of land at the date of the bill, the intention of the deviser will control the decision of the question.

Coons v. Coons, Exr., 4 Ky. Opin. 663.

Heirs and distributees have a right to demand distribution of an estate on the happening of a contingency contemplated by the testator, and such payment would be a liquidation of the executor's liability on account of assets.

Stout, Exr., v. Moore, 4 Ky. Opin. 321.

Where no rule or order of the court is necessary before an administrator disposes of a fund, the rights of parties against whom a rule was issued are not prejudiced thereby.

Best v. McIlvoy's Admr., 9 Ky. Opin. 302.

§ 289. Priority of debts to legacies or distributive shares.

The rights of general devisees are subservient to the rights of those to whom property has been specifically devised, with respect to the payment of the debts of the testator.

Blanchard v. Herbert, 5 Ky. Opin. 8.

An estate is liable first to creditors and then to the devisees to be distributed according to the will of the testator.

Worthington v. Smith, 12 Ky. Opin. 711.

§ 294. Liabilities of legatee or distributee to estate.

Devisees can not claim the estate devised to them in the balance of the tract of land and deny the right of the

testator to dispose of the rest, and thereby defeat the interests therein intended to be secured to their children.

Fentress v. Holmes, 5 Ky. Opin. 21.

Where a son while executor of his father's estate, surrendered a title bond of the father for a large tract of land, upon which was due \$450.00 and executed his own note therefor, and in default of payment the land was sold and bought by a third party, it will not preclude an heir of the deceased from tendering her pro rata of the unpaid lien of \$450.00 and having a deed made for her distributable portion of the land.

Mooney v. Morgan, 3 Ky. Opin. 281.

Where the payment of a legacy is contingent upon the sale of the property of the testator, the administrator should be allowed a reasonable time within which to make it.

Maddox v. McCallis, 3 Ky. Opin. 73.

§ 295. Time for delivery or payment of legacy.

Where a will gives executors the power: "All the bequests, devises, legacies, etc., are not to be paid until * * * arrive at the respective ages of 30 years," the executors could not withhold all the payment, at their discretion until the 30-year age had been reached by the devisees.

Fogle's Exrs. v. Fogle, 4 Ky. Opin. 492.

Where the testator provides for a distribution of his estate among his children, when each arrives at the age of thirty years, such children can not receive the principle of such legacies until they are thirty years old, but the executors may advance to each their portion of the income of the estate for their maintenance.

Fogle v. Fogle's Exr., 9 Ky. Opin. 411.

§ 300. Delivery of specific legacy.

If no time is fixed for the payment of a specific pecuniary legacy, it shall

be paid off one year after the testator's death, and carry interest after due.

Maddox v. McCallis, 3 Ky. Opin. 73.

§ 301. Advances by executor or administrator.

Where a father, who has land that is sold for taxes, gives such land to a son on condition that he redeem it, the son is chargeable for the value of the land, less costs of redemption, as an advancement, the value of such land being ascertained as of the date of the gift.

Boyer v. Boyer, 9 Ky. Opin. 255.

§ 302. Mode and sufficiency of payment.

A writing executed by an administrator stating that there is due a certain person as his share of the estate \$200 "to be paid," which was signed by the administrator, was properly treated as evidence of a fiduciary liability, which was not affected by proceedings in bankruptcy by the administrator individually.

Cheatham v. Cheatham, 6 Ky. Opin. 450.

After a usurious note has passed into the hands of a legatee as his distribution of an estate, it can only be purged on an amount prorated according to his share of the estate.

Perrin & Rowland v. Ammerman, 3 Ky. Opin. 534.

Devisees seeking to recover rent paid to an administrator will be required to exhaust their remedy against the sureties of the administrator before calling on the tenant for reimbursement.

Harmon v. Ross' Admr., 3 Ky. Opin. 266.

§ 308. Improper payment in general.

Where one is administrator of an estate and also guardian of one of the minor heirs, and distributes money to one of the heirs knowing that such heir is indebted to his ward, and such debt is lost to his ward, he is liable to the ward for his negligence in failing to withhold such money.

Hood v. Hood, 9 Ky. Opin. 65.

Where an administrator has knowledge of the existence of a valid claim

or judgment against the estate he represents and still distributes the estate to the heirs without requiring refunding bonds, he is liable and may be held as responsible as if the assets were in his hands, but if he has acted in good faith he may recover of the distributees whatever sums he may be compelled to pay on such claim.

Hooser v. Hooser, 11 Ky. Opin. 651.

§ 309. Payment before order or decree.

The executor has the right to pay over the assets of the legatee in his hands, although there is danger of improvident use and waste of the fund, the remaindermen having the right alone to prevent it.

Bowman v. Utley, 1 Ky. Opin. 443.

Where payments to husband and wife, for which an administrator obtained judgment, were made expressly in discharge of their portion as distributees out of the admitted surplus in the administrator's hands, the administrator having made the payment with the means of full knowledge of what was in his hands, it is to be presumed that he paid them no more than they were entitled to.

Conrad v. Cleaveland, 1 Ky. Opin. 165.

§ 310. Overpayment.

Where an administrator overpays a distributee, pendente lite, a rule for restitution is the proper remedy.

Colvin v. Reynolds, 4 Ky. Opin. 282.

§ 314. Proceedings for payment or distribution.

The personal representative of the deceased having answered to the merits of the suit to settle the estate, and having failed to allege that no demand or affidavit had been made, it will be presumed that the statute had been complied with.

Robinson's Admr. v. Hicks, 1 Ky. Opin. 152.

Where the petition only alleges that the plaintiffs are half-brothers and sisters to the deceased, the simple fact of propinquity does not show heirship,

death without issue being indispensable.

Saffell v. Butts, 1 Ky. Opin. 250.

Generally, an action for a settlement of an estate can not be maintained by remaindermen, but under some conditions such an action may be maintained in order that the remaindermen may ascertain the extent of their interest in the estate.

Abell v. Abell, 11 Ky. Opin. 128.

§ 318. Liability to refund or deficiency of assets.

Devisees, receiving by way of advancements, can only be required by a creditor of the deviser to pay what was received under the will after the death of the testator, and what is given as advancements prior to the testator's death can not be included in the estimate in order to fix the extent of the devisee's liability.

Coleman v. Hess, 10 Ky. Opin. 546.

VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

(A) WHEN AUTHORIZED.

§ 322. For payment of debts.

§ 323.—Necessity in general.

An administrator has no right to take possession of realty, where it does not become necessary to use it to pay debts, but where he does so he is estopped to say that he must be proceeded against in his individual capacity for the rents and not as administrator.

Thomasson v. Lucas, 12 Ky. Opin. 45.

Where a testator directs the payment of debts by the sale or rent of the property, the executor has authority to sell the real estate, and has the discretion as to the time, manner and terms of sale, and, when it is necessary to pay debts, an executor has the power, given by the statute, to sell real estate.

McCulloch v. Sanders' Exr., 12 Ky. Opin. 384.

§ 325.—Insufficiency of personality.

Where a suit is brought by an administrator to settle an estate, and it

is made to appear that the personal estate is not sufficient to pay debts, the real estate should be ordered sold.

Metter v. McBride's Admx., 9 Ky. Opin. 484.

Where one dies the owner of real estate which, because of the fact that the personal property is inadequate to pay the decedent's debts, is sold by an administrator to pay debts, such a purchaser can not be deprived of the land by the heirs of such decedent, who were all made parties in the proceedings to sell.

McDyer v. Scaggs, 13 Ky. Opin. 597.

§ 327. Effect of testamentary provisions.

Where a testator directed his executors to retain the control of certain land for the period of five years, or for a longer period if they thought it to the interest of his estate, and after that they were directed to sell it and give one-third of the proceeds to his widow, one-third to a daughter and the remainder to trustees for benevolent purposes, the income of the estate to be given to his widow, it sufficiently appears that the executor or administrator has the power to lease the land during the time before its sale when it appears to be to the best interest of the estate to do so.

Given's Admr. v. Shouse, 12 Ky. Opin. 372.

§ 329. Property or interests subject to disposal.

An executor is only authorized to sell real estate when directed by the will to do so, or when it becomes necessary to pay debts, and the personal property is not sufficient for such purposes.

Shaugherssey v. Huffman's Admr., 8 Ky. Opin. 714.

Where a testator devises certain land to his wife for life and directs his executor to sell other estate than that devised to the wife for life and also certain personal property and to hold the proceeds for certain of his devisees until they are twenty-one years old, the executor has no control of the land devised to the widow, either dur-

ing or after the termination of the life estate.

Thompson v. Thompson, 11 Ky. Opin. 812.

(B) APPLICATION AND ORDER.

§ 335. Parties.

Real estate of a decedent should not be sold without making the heirs parties to the proceedings.

Freeman's Admr. v. King, 7 Ky. Opin. 8.

From the fact that an administrator filed a petition for settlement of the estate, it can not be inferred that the heirs were made parties to the action.

Freeman's Admr. v. King, 7 Ky. Opin. 8.

§ 345. Order or decree.

§ 346.—Requisites in general.

A judgment directing the sale of real estate by an executor or administrator, is invalid which fails to prescribe the time that the property should be advertised for sale.

Mattingly v. Lee's Admr., 8 Ky. Opin. 215.

§ 356. Actions for sale.

The heirs are necessary parties in a proceeding of an administrator to sell real estate to pay debts, and a judgment against infants in such a proceeding is void when they were not served with process.

Messmore v. Stone, 13 Ky. Opin. 304.

(C) SALE.

§ 363. Manner and conduct.

Although the chancellor orders a sufficiency of land sold to pay the intestate's debts, yet the court should make the sale through its commissioner and by proper orders distribute the proceeds, and should the court select one of the administrators as a commissioner to sell land, this would impose no new burden on him as administrator nor additional liability on his securities; and the placing of the funds from such sale in his hands by order of the court is as a commissioner of the court, and not as administrator.

Reynolds v. Nelson, 1 Ky. Opin. 523.

§ 365. Persons who may purchase.

An administrator, who is a creditor of an estate and entrusted with the sale of property to pay debts, can not legally become the purchaser of such property, unless the entire transaction is characterized by the utmost good faith.

Hoggins v. Elliston, 8 Ky. Opin. 328.

Although an executor has no right to purchase at his own sale, yet if he chooses to do so he can not complain if he is compelled to account for the property at its appraised value.

Graves v. Motherhead, 7 Ky. Opin. 212.

An administrator who is an heir may legally purchase for the estate the equity of redemption in real estate sold and redeem the land from the original purchaser and save money to the estate he is administering, and where he does so, he is entitled to credit for the sum thus expended.

Jones' Admr. v. Shy's Admr., 8 Ky. Opin. 890.

An executrix will not be permitted to purchase the land belonging to the testator and reap a personal benefit from such purchase, for instead of standing by and permitting the lands to be sold to pay debts, she should pay off the debts and save the estate upon which she is administering, but in no event will she be permitted to reap a personal benefit by speculating in such lands.

Bartlett's Admr. v. Gray's Admr., 11 Ky. Opin. 866.

An executor having charge of the real estate of the testator for the purpose of paying debts has no power to become himself a purchaser of the estate in any proceeding, so as to affect the rights of creditors.

Rogers v. Burbridge, Committee, 13 Ky. Opin. 517.

§ 366. Bids or offers.

An executor in making a public sale of real estate represents the owners of the estate in a confidential relation, and where he agrees privately with a bidder present to bid for him and buy the property at a price not exceeding

so much his conduct in so doing is unfair to those owning the property, since he can not as their trustee be put in a position to represent those whose aim is to buy the property at a low price; and where a sale is so made on a bid by the executor for such buyer it will be set aside as unfair, since a trustee can not be allowed to represent both sides of a sale and purchase.

Larkin v. Crawford, 12 Ky. Opin. 322.

§ 367. Validity in general.

Where a will provides for the sale of real estate under certain conditions which arose thereafter, the petition states a good cause for selling, all the parties in interest being made defendants and process was issued but not served in time, and the property sold for its full value, the proceeding will not be held void either because the warning order to non-residents was defective or because the clerk of the court who entered upon the court's judgment was the guardian ad litem and became the purchaser.

Spencer v. Milliken, 12 Ky. Opin. 97.

§ 369. Failure of bidder to complete purchase.**§ 372.—Liabilities of bidder.**

When one buys real estate from an administrator, who is ordered to sell the same to pay debts of the estate, the purchase money is still subject to the order of the court, and where the sale order provides that taxes and other liens be paid, the purchaser can not refuse to complete his purchase on account of the existence of such liens as they will shift to the fund, and may be paid by the administrator out of such purchase money.

Metter v. McBride's Admr., 9 Ky. Opin. 484.

Where at an administrator's sale of a deceased tenant's property, the landlord notifies the administrator of his lien on such property, and buys the property at such sale, he is only required to pay that part of his bid which is in excess of his lien, where it is not shown that there is not suffi-

cient other property to pay decedent's funeral expenses.

Robertson v. Hackney's Admr., 9 Ky. Opin. 756.

§ 380. Actions to set aside.

Where real estate is conveyed to a trustee with an agreement to sell so much as is necessary to pay off debts, and convey back to the grantors for life, and the fee to their children, but the trustee actually conveys the remainder of the real estate to such grantors in fee simple and one of the grantors dies, such real estate can not be sold to pay her debts, for under the contract she is the owner only of a life estate therein, and the court will set aside an order made to sell such real estate, on the petition of the children of such decedent.

Richards v. Richards' Admr., 9 Ky. Opin. 316.

Where an administrator petitions to settle the estate and for an order to sell lands to pay debts, and a commissioner makes a sale for much less price than such land might bring at another time if the sale is fairly made, it is not a sufficient ground for setting aside the sale; but in order to authorize a sale to be set aside for inadequacy of price, it must be so great as to import fraud.

McClain v. Matthews, 10 Ky. Opin. 468.

§ 388. Title and rights of purchasers and their privies.

Where one is executrix of a will and buys in property sold at the instance of creditors of the heirs, and takes the sheriff's deed as an individual and not as executrix, the presumption is that she claimed the purchase for her individual benefit and not as executrix.

Bramlett's Admr. v. Gray's Admr., 11 Ky. Opin. 866.

§ 389. Rights and remedies of purchasers on avoidance of sale.

Where an administrator sues in equity to recover personal property in the hands of a legatee, recovery can not be had merely for the purpose of

enabling him to repay the devisee the sum of money received.

Denton's Exr. v. Parker, 6 Ky. Opin. 227.

An executor who loans money of his testator, and, by a transfer of the note thus taken, secures other notes from different parties, which latter notes prove worthless on account of his want of vigilance, is held liable personally for the loss thus sustained to the estate.

Evans v. Hord, 2 Ky. Opin. 636.

The heirs of the decedent, not being concluded by the judgment against the administrator not bound thereby, have the right to controvert the justice of the claim against their ancestor, and to enable them to do this, the same must be made the foundation of the action.

De Bard v. Dawson's Admr., 4 Ky. Opin. 344.

Where appellant sued R's administrator and the heirs for a breach of a covenant of warranty binding the vendor and his heirs, and the administrator, after answer, was permitted to withdraw it and move a dismissal of the petition, because a sufficient demand had not been made of the administrator; and the court dismissed the petition without prejudice; before full preparation, such an answer may be withdrawn and a dismissal ordered, although the heirs could not require such statutory demand.

Smith v. Raymond's Admr., 3 Ky. Opin. 658.

In a suit by an administrator de bonis non against a former administrator the court should compel him to surrender all the choses in action and chattels belonging to the estate in order that the former could enforce payment or make the latter liable for their value, but the sureties can not be held liable to the administrator de bonis non, while they would be to the heirs and creditors.

White v. Dunn, 5 Ky. Opin. 233.

§ 391. Liabilities of executor or administrator.

An administrator will be held personally liable if he sells the goods of

his intestate and accepts security which would not have been accepted by a man of ordinary prudence.

Sublett's *Exr. v. Brookie*, 10 Ky. Opin. 465.

Where an executor wrongfully sells land which, by the terms of the will, is otherwise disposed of, and his grantee is forced to give it up, such executor is not bound to charge himself with the sale price of such land, but in a suit by the wronged purchaser he is liable personally for such purchase-money.

Collins v. Sanders, 12 Ky. Opin. 579.

(D) CONVEYANCE.

§ 394. Authority to make.

The executor may convey a legal title to testator's land after it has reverted to the estate, for the purpose of carrying out the provisions of the will.

Freer v. Chandler, 1 Ky. Opin. 301.

IX. INSOLVENT ESTATES.

§ 414. Sales and conveyances under order of court.

If the assets of a decedent's estate are insufficient to pay decedent's debts, the administrator must resort to his equitable action authorized by Civ. Code, R. S., ch. 40, § 10.

Berry v. Hopkins, Admr., 6 Ky. Opin. 515.

§ 418. Distribution and settlement.

Where there is no real estate to sell, and the deceased was insolvent, the heirs are not necessary parties to a suit to distribute the said estate of the decedent among his creditors, there was no error in not appointing a guardian ad litem for infant heirs.

Rupard v. Rupard's Admr., 1 Ky. Opin. 28.

X. ACTIONS.

§ 420. Capacity to sue and be sued in general.

Where a deceased court commissioner failed to make proper payments, his legal representative can be proceeded against only in the same

manner as is employed for the collection of debts from personal representatives.

Stites' Exr. v. Howells, 7 Ky. Opin. 125.

Under provisions of § 10, ch. 40, Rev. Stat., an action can not be maintained against the heirs of a decedent, upon a decree rendered against the administrator alone, but must be based upon the original liability of the decedent.

De Bard v. Dawson's Admr., 4 Ky. Opin. 344.

§ 423. Actions by creditors and others interested in estate.

An administrator may be called upon to show whether he has collected any of the fee-bills returned to the county court, as he is entitled to all the assets not administered.

Curd v. Mix, Admr., 6 Ky. Opin. 332.

A settlement between two administrators in regard to their accounts should not be allowed to delay the prosecution of a suit by the distributees.

Curd v. Mix, Admr., 6 Ky. Opin. 332.

The right of action in a suit for waste is in the distributees, and not in the administrator de bonis non.

Curd v. Mix, Admr., 6 Ky. Opin. 332.

Where decedent died soon after he was served with a summons by a creditor, and no further steps were taken, and the executor brought a suit to settle the estate and procured an injunction against creditors bringing actions on their claims, it was the duty of such creditors to appear in the suit brought to settle the estate, and not otherwise; and the creditor who had procured service on decedent can take no other steps in the face of the injunction.

Vanarsdale v. Vandyke's Exr., 9 Ky. Opin. 601.

A judgment creditor against an estate where there is an administrator acting for such estate, who has not refused to enter suit against a former administrator and his surety to re-

cover assets coming in the former administrator's hands, can not legally maintain a suit to collect such assets.

O'Bannon v. Cord, 10 Ky. Opin. 856.

Personal representatives alone are authorized to sue for and recover money due an intestate; and it is only where it is alleged that there is no executor or administrator that heirs or descendants may sue or receive such money.

Isaacs v. Murphy, 10 Ky. Opin. 868.

§ 424. Rights of action between co-executors and co-administrators.

Though an executrix can not, as such, maintain an action on a note made payable to her testator as executor; unless the petition is demurred to, or objection made in their answer, defendants will be deemed as having waived the objection.

Scott v. Scott's Exrs., 2 Ky. Opin. 639.

One executor can not institute an action at law against his co-executor for the recovery of property belonging to the estate, for one executor has as much right to the possession as the other; since when it becomes necessary to sue a co-executor the proceeding can only be brought in equity.

Highbogh v. Highbogh, 10 Ky. Opin. 415.

An administrator de bonis non can not maintain an action against his predecessor for a settlement, as such action can only be maintained by a creditor or distributee.

Craycroft's Admr. v. Clay's Admr., 10 Ky. Opin. 479.

§ 425. Rights of action by executors and administrators.

§ 426.—In general.

A suit can not be maintained by an administrator de bonis non against a former administrator of the same estate for failing to discharge the obligations of his bond.

Curd v. Mix, Admr., 6 Ky. Opin. 332.

In a suit by an administrator against the widow of the deceased to recover certain gold which the widow claimed as a legacy, failure of the administra-

tor to introduce any evidence with reference to the indebtedness of the estate, when taken in connection with his evasive reply to defendant's answer will be taken as an admission that there are no debts of the estate to be paid.

Denton's Exr. v. Parker, 6 Ky. Opin. 227.

A personal representative empowered to sell land by the terms of a will has no right to maintain an action of ejectment against those in possession, since the title to such land is in the heirs, and they must be made parties to such a suit.

Murphy v. McRoberts, 8 Ky. Opin. 622.

Where a decedent died prior to any distribution of the proceeds of an association of which he was a member and before the members were empowered by law, in the event of a dissolution, to retain the property among themselves, the administrator can not maintain an action against the living members for contribution.

Smith's Admr. v. Louisville Benevolent & Relief Assn., 8 Ky. Opin. 152.

§ 428. Rights of action against executors and administrators.

Where money or property comes into the hands of an administrator, and it is not accounted for and paid over to those persons entitled to it, and a new administrator is appointed, it becomes his duty to proceed by suit or otherwise to collect such assets from the former administrator and the sureties on his bond.

O'Bannon v. Cord, 10 Ky. Opin. 856.

§ 430.—Personal or representative capacity.

The individual indebtedness of an executor, contracted during the lifetime of the testator, is like any other indebtedness, and should be collected in the same way that other debts are collected under the law.

Herzog v. Harper, 9 Ky. Opin. 681.

§ 431. Conditions precedent.

Where the amount due from the administrator is shown by the records, it is not unreasonable to require claim-

ants, before bringing suit against him, to verify their claims and demand payment of the administrator.

Stites' Exr. v. Howells, 7 Ky. Opin. 241.

An administrator or other trustee when called upon by a pleading to show receipts and disbursements of his trust, should, by a court of equity, be compelled to respond before being permitted to proceed with his cause.

Hanna's Admr. v. Hanna's Admr., 8 Ky. Opin. 153.

The failure to make requisite preliminary proof and to demand payment before commencing suit against a personal representative on a demand due from the decedent must be taken advantage of by affidavit and rule.

Prirey & Sanders v. Conway's Admr., 10 Ky. Opin. 199.

§ 434. Set-off and counterclaim.

A debt due from an executor can not be pleaded as a set-off against an individual debt.

Fox v. Apperson & Reid, 8 Ky. Opin. 233.

§ 435. Jurisdiction.

Where a petition is filed in one county, and afterward a change of venue is granted to another, the latter court has jurisdiction over an intestate's estate, though letters of administration were granted by the former county court.

Wibb v. Spellman, 1 Ky. Opin. 439.

§ 436. Venue.

Administrators of an estate can only be sued in the county in which they qualified and the county where their decedent resided at the time of his death.

Murrell v. Dugan's Admr., 8 Ky. Opin. 864.

An action to enforce a claim against an estate may be brought anywhere in the state where process can be served.

Maddox's Exr. v. Williams, 12 Ky. Opin. 466.

§ 438. Parties.

The estate of an assignee of a

claim can not be held to lose the benefit of the assignment merely because the personal representative failed to become a party to the suit in which the assignor was prosecuted, and which he might well believe would secure the rights of the estate.

Platt & Watts v. Platt's Admr., 6 Ky. Opin. 342.

The heirs of a decedent must be made parties to a petition of an administrator to sell real estate to pay debts, and where they are named as defendants, but join the administrator as plaintiffs, an order of sale procured in such action will not be set aside.

Bennett v. Smith's Admr., 8 Ky. Opin. 202.

§ 442. Pleading.

§ 443.—In general.

A petition to subject land of a decedent to the payment of his debts, which alleges that the deceased owned a tract of land in said county, containing _____ acres, is wholly insufficient for lack of description of the land.

Brake v. Brake's Admr., 7 Ky. Opin. 450.

An allegation in a petition that the estate of the decedent was indebted to the plaintiff in the sum of \$—, does not state a cause of action, since if the petition be taken as confessed, a judgment for \$— would be no judgment at all.

Brake v. Brake's Admr., 7 Ky. Opin. 450.

Where a note was given an administrator for rent of decedent's property, and upon suit being brought, appellants resisted payment upon the ground of possibility of having to make payment to the heirs for the same debt, a demurrer to the answer was improperly overruled.

Harmon v. Ross's Admr., 3 Ky. Opin. 266.

A petition against an administrator, charging a sufficiency of assets in his hands belonging to the estate, to satisfy their claim, presents a cause of action, and is good on demurrer.

Creel's Admr. v. Hill & Ray, 4 Ky. Opin. 359.

A petition on a judgment against an administrator, in an equitable action against the heirs, set out the fact that an execution had been issued upon the judgment against the administrator, and had been returned nulla bona, and that said judgment remained wholly unpaid, but made no reference to the nature of the original liability of the intestate, is insufficient to constitute a cause of action.

De Bard v. Dawson's Admr., 4 Ky. Opin. 344.

Where a personal representative has commenced litigation, a claim against the intestate can be pleaded by way of set-off or counterclaim as a defense to the action, without the affidavit and demand prescribed by the civil code.

Amsbro v. Byrne's Admr., 5 Ky. Opin. 191.

Where the heirs of the wife sued the administrator of the husband to have their rights determined as to a note and mortgage alleged to belong to the wife, it is incumbent upon the heirs to allege and prove such facts as will show that they are entitled to the relief sought.

Morgan's Admr. v. Nicholas, 6 Ky. Opin. 402.

Where an administrator is charged with the misuse of funds, coming to his hands, and the petition contains no averment of the amount of assets coming into the hands of the administrator, an answer thereto is sufficient which alleges that all the assets had been used in the payment of the debts of the decedent before notice of the plaintiff's claim.

English's Admr. v. Cropper, 9 Ky. Opin. 428.

A petition against an administrator for wrongfully placing credits on notes in his possession is insufficient where it is not alleged that the credits were placed on the notes by the defendant, but merely sets up a state of facts in which such a wrong might have been perpetrated.

Lentz v. Park's Admr., 10 Ky. Opin. 762.

One in possession of notes which do not belong to him, but which belong to an estate, in a suit by the estate to recover them should not be permitted to set off a claim which he thinks he has for services rendered the decedent; but he should first have been compelled to pay over to the administrator these assets, and then he should be required to prove his claim against the estate.

Myers' Admr. v. Bosley, 11 Ky. Opin. 765.

§ 444.—Allegation and denial of representative capacity.

Before one can maintain an action as administrator, he must allege that the court having jurisdiction to appoint administrators has appointed him, and that he has executed the required bond, and accepted the trust.

Montgomery v. Murray's Admr., 10 Ky. Opin. 275.

§ 452. New trial.

Where in a suit for the settlement of an estate the record shows that nearly three years elapsed after the reports were filed, in which it is claimed credits were omitted, before any move is made for a new trial, or correction thereof, no such diligence is shown entitling an interested party to relief.

Best v. McIlroy's Admr., 9 Ky. Opin. 302.

Where a suit is brought for the settlement of an estate and a finding made thereon, interested parties desiring a new trial must file their motion or petition therefor containing a statement of facts constituting their grounds for such new trial.

Best v. McIlroy's Admr., 9 Ky. Opin. 302.

§ 453. Judgment.

Under § 437 of the Civ. Code, an action to revive a judgment against a personal representative of a deceased judgment debtor is an action contemplated by such section, and where the necessary affidavit and demand has not been made before suit was instituted, the petition may be dismissed.

Berry v. Hopkins, Admr., 6 Ky. Opin. 515.

In a judgment against an administrator it should be ordered that the amount be made of assets unadministered in the hands of the personal representative and of assets descended to the heirs.

Dickens v. Yelton, 1 Ky. Opin. 377.

To authorize a judgment de bonis propriis against an executor, the answer must allege assets in his hands to be administered, and that the executor has been guilty of a devastation.

Lawry's Admr. v. Beverly, 4 Ky. Opin. 383.

A judgment dismissing an administratrix's petition at her cost is not a judgment against her personally, but against her fiducial character.

Shercliff v. Cooper, 5 Ky. Opin. 774.

Where the Court of Appeals reversed a judgment and remanded the case for correction of settlements of executors, so as to hold the executors liable for the price of a slave, it was held that such decision did not authorize a personal judgment against the executors.

McGehee v. Miles, 6 Ky. Opin. 470.

A joint judgment in favor of an administrator de bonis non and the distributees, against the administrators where the administrator de bonis non was not a party to the action and was not entitled to judgment, is erroneous.

Curd v. Mix, Admr., 6 Ky. Opin. 332.

When, in a suit by an administrator against heirs and creditors to settle an estate as insolvent, an issue is made between a creditor and the estate, which is referred to and reported by a master, who hears the evidence, and upon exceptions being filed to the report, it was heard and overruled by the court and judgment entered against the claimant, such judgment is final, and the trial court has no power after the term of court ends to permit the creditor to with-

draw his claim and then modify his judgment.

Garvin v. Showdy's Admr., 8 Ky. Opin. 142.

No valid judgment can be rendered against an administrator who is not before the court, and no judgment can be rendered against the estate of a deceased person until there is an affidavit filed that the claim for which the judgment is sought is subject to no just offset and does not embrace any usurious interest.

Thompson's Admr. v. Bartley's Admr., 9 Ky. Opin. 791.

§ 454. Execution and enforcement of judgment.

A defect in a petition on a judgment against an administrator, that does not set up the original liability of the decedent, is not waived by a failure to demur to same.

De Bard v. Dawson's Admr., 4 Ky. Opin. 344.

§ 455. Appeal and error.

Where administrators desire a settlement of accounts as between each other, such requirement must be inserted in the order of reversal, or they must file a cross-pleading for that purpose.

Curd v. Mix, Admr., 6 Ky. Opin. 332.

Where in the trial of a claim against a decedent's estate, one of the heirs is offered as a witness, and an objection is sustained to the competency of such witness, but no statement is made as to what he would prove by such witness, the Court of Appeals can not know that the evidence would have been material or that the refusal to permit him to testify was prejudicial to the appellant.

Mitchell's Admr. v. Cannon, 9 Ky. Opin. 260.

Where an appeal bond is executed to an administrator, the appellant is estopped to question the fiduciary character of such administrator.

Pitman v. Watkin's Admr., 9 Ky. Opin. 902.

XI. ACCOUNTING AND SETTLEMENT.

(A) DUTY TO ACCOUNT.

§ 458. Nature and grounds.

An administrator should keep accurate accounts of all sale of the personal property of the estate, whether made publicly or privately, and if he fails to do so his liability on account of such property can only be ascertained by adopting the appraisalment as correctly setting out its value.

Hayden's Admr. v. Bell & Son,
5 Ky. Opin. 469.

§ 459. Time for accounting.

An administrator has two years in which to settle his accounts, and during that period he has a right to retain the assets to pay debts and liabilities against the estate, and is not liable to pay interest, unless he has put the money at interest or has made profit on it.

Hines v. Humphries, 5 Ky. Opin.
45.

At the expiration of two years from the date of the qualification of an administrator, the law presumes he will have had time to have paid the debts and be ready to make distribution, and from that time he will be presumed to have used the money.

Pointer v. Cassady, 3 Ky. Opin.
649.

§ 461. Who liable in general.

An executor de son tort is liable to the rightful representative of a decedent, and not to the heirs or distributees the claims of the heirs being postponed to the rights of creditors.

Huff v. Dehaven, 8 Ky. Opin. 634.

Where one as executor of the estate of the wife's father has money belonging to the wife, which she agrees may be given to him on account of the husband's debt, neither the executor nor his sureties are liable to account to her for the money thus received.

Walker v. Spalding, 10 Ky. Opin.
620.

Where a testator does not dispose of all his property, in distribution of the undivided portion thereof the heirs

and devisees may be made to account for advancements made to them.

Talbott v. Clarkson, 10 Ky. Opin.
668.

(B) PROCEEDINGS FOR ACCOUNTING.

§ 469. Jurisdiction of courts.

A suit to settle or resettle an estate must be brought in the county in which the personal representative qualified.

Ecton v. Smith, 12 Ky. Opin. 725.

§ 471. Proceedings by executor or administrator.

In an action by an administrator to settle the estate, sell land to pay debts, and divide the land among the heirs, and to obtain an allowance for claims for which he was not given credit in a former settlement, an answer surcharging the former settlement and alleging plaintiff's indebtedness to the heirs as a set-off against the claims, presents a good defense.

Million's Admr. v. Holeman, 7 Ky.
Opin. 640.

In a settlement suit by an administrator, if he is allowed a claim against the estate, he is entitled to a judgment for attorney's fees.

Million's Admr. v. Holeman, 7 Ky.
Opin. 640.

§ 472. Special proceedings to compel accounting.

In a suit by distributees against administrators to recover money in their hands for which they had failed to account, it is proper to make the administrators liable for any assets not reported by them and for which they failed to account.

Curd v. Mix, Admr., 6 Ky. Opin.
332.

§ 473. Actions for accounting, and administration suits.

An amended petition in a settlement suit is insufficient where it alleges overpayment to certain of the distributees, but leaves the amounts in blank, since no relief could be granted thereon if the amended petition should be taken as confessed.

Stegal v. Fish's Admr., 7 Ky.
Opin. 383.

Where an administrator settles his accounts and has left in his hands a sum for distribution to the heirs of his decedent, but does not distribute, a joint suit may not be maintained by the heirs, but each has a separate cause of action against such administrator and his bondsmen.

Jones' Heirs v. Jones, 8 Ky. Opin. 285.

Where a decedent left surviving him eight children, but one of them died thereafter before the settlement of the estate, it is error to apportion and settle the child's estate in the proceeding to settle the estate of the father, since the one is entirely separate from the other.

Fowler v. Fowler, 10 Ky. Opin. 619.

Whether a conveyance is made in satisfaction of a legacy, must be determined from all the facts and circumstances surrounding the action; and where a pleading denies that it was the intention of the testator to satisfy the legacy by the conveyance, the issue is formed and should be tried.

Casey v. Pence, 10 Ky. Opin. 689.

(C) CHARGES AND CREDITS.

§ 475. Charges in general.

Statement of manner of charging and crediting an estate in making settlement.

Stow v. Curd, 6 Ky. Opin. 257.

It is error to charge against the whole assets of an estate, amounts enjoined by particular distributees; since such items should be included in the particular shares interested; but not in the general assets, thereby reducing the proportionate amount due those not concerned in the litigation.

Hardin's Exr. v. Willis, 2 Ky. Opin. 512.

An executor will not be heard to complain because he is charged with the amount of notes on hand belonging to the testator at the time of his death, as it was his duty, as executor, to have made and returned an inventory of these notes.

McElroy v. Phillips, 3 Ky. Opin. 474.

§ 478. Interest.

Interest due on a legacy is chargeable to the executor and not the estate of the testator.

Maddox v. McCallis, 3 Ky. Opin. 73.

Where the cost is the result of the administrator's illegal conduct, he should pay it out of his own fund, but, so far as it has accrued in settling the estate, it should be paid out of the assets.

Tribble v. Ellison, 1 Ky. Opin. 59.

The administrator is presumed to have used the assets, after two years, and will be charged interest, unless the presumption be rebutted, it being permissible to show that he used the assets before the expiration of two years and that he should be charged with interest.

Tribble v. Ellison, 1 Ky. Opin. 59.

Unless the administrator uses the assets or makes interest thereon, he should not be charged with interest upon the amount in his hands.

Tribble v. Ellison, 1 Ky. Opin. 59.

Where an administrator refuses to make a transfer of stock left by an estate, though through an erroneous impression, whereby a suit is necessary to enforce the transfer, the administrator will be held liable for the costs of court.

Lair v. Keys, 1 Ky. Opin. 599.

Where a petition was filed and a personal judgment was rendered without allegation or proof that any assets came into the hands of the administrator, it was erroneous to render a judgment against him, and even with such proof the judgment against him could be only for the debt, interest and costs to be levied of assets in his hands to be administered.

Lawson's Admr. v. Doty, 2 Ky. Opin. 187.

It was error to compound interest against the administrator with biennial rests.

Noland v. Elkins, 2 Ky. Opin. 144.

Where an administrator deposits moneys of an estate with a firm of which he is a member, it will be presumed that the money was used, and

he will be charged interest thereon after two years.

Dodd, Admr. v. Kuykendall, 3 Ky. Opin. 193.

If a personal representative has accounted for interest collected on notes, he can not be made to pay double interest by being compelled to pay interest on the share of the widow.

Corbett v. Johnsons' Admr., 13 Ky. Opin. 246.

§ 479. Credits in general.

An administrator, who pays a claim after he is notified by those interested in the estate that the claim had been paid in full by the decedent, and it turns out that such claim had been fully discharged, is not entitled to any credit in his final settlement for the sum thus paid on account of such claim.

Down's Exr. v. Miller, 9 Ky. Opin. 53.

§ 482. Expenses of administration.

Where decedent pledged fifty hogsheads of tobacco to secure a debt of \$6,000.00, the tobacco being worth a much larger sum than that for which it was pledged, and the executrix being desirous to redeem it, and to ship it to a foreign market, drew a sterling bill of exchange on Gilliott & Co., consignees in the city of London, for over \$8,000.00, which she sold to appellant, and with a part of the proceeds redeemed the tobacco; and the tobacco was destroyed by fire in transit and became a total loss to decedent's estate, and appellant claimed that its debt constituted a part of the necessary expenses of administration; the debt thus created, and apparently secured, should not be treated as a preferred debt after the loss of the security, to the injury of other creditors.

Farmers' Bank v. Green's Exr., 4 Ky. Opin. 258.

§ 485. Counsel fees and costs.

The administrator is not entitled to employ counsel at the expense of the estate to set up his personal claim, inconsistent with the interest of the heirs, but he should be allowed a reasonable sum for advise of counsel in the administration of the estate.

Tribble v. Ellison, 1 Ky. Opin. 59.

§ 486. Debts and payments to self.

If an administrator has a claim against the estate, he should make a settlement of his accounts before he subjects the real estate to the payment of his debt.

Thomas v. Miller, 5 Ky. Opin. 349.

(D) COMPENSATION.

§ 488. Right to compensation in general.

An administrator can not sue himself as such, for personal service rendered the estate.

Rause v. Deacon, 4 Ky. Opin. 219.

An executor who serves as such and who has done no wrong should be paid for his services, since he can not be deprived of reasonable compensation for such services, and it is error for the chancellor to deprive him of them.

Rogers v. Burbridge, Committee, 13 Ky. Opin. 517.

§ 492. Waiver of right.

Where a personal representative acts as commissioner on making sales of land belonging to the decedent's estate, a reasonable allowance should be made to him in addition to his commission.

Bowman v. Bowman's Admr, 5 Ky. Opin. 205.

§ 495. Commissions.

Five per cent. is the usual allowance made to personal representatives as compensation for the amount collected by them, and sometimes a commission of 5 per cent. will be allowed only on disbursements, but it may be allowed on the amount collected, and in cases of much trouble and difficulty in collecting, when the debts are small, seven per cent. may be allowed but to authorize such an allowance the difficulties enumerated must be proven.

Bowman v. Bowman's Admr., 5 Ky. Opin. 205.

An administrator who is a creditor of his decedent should not be allowed a commission for the collection of his own claim.

Worsham v. Worshams' Admr., 9 Ky. Opin. 37.

Where a debtor is appointed as administrator of an estate to which he is indebted, he must charge himself with

such debt and will be held to have received it, and, strictly speaking, an administrator is not entitled to any commission or allowance as administrator in collecting a claim against himself, but where a small allowance is made to him therefor, this court will not reverse on account of it.

Webster v. Webster, 13 Ky. Opin. 545.

§ 496. Amount and computation of compensation.

Five per cent. is a reasonable compensation for an administrator on the amount collected and paid out, subject to be increased if unusual difficulties attend the collection.

Trible v. Ellison, 1 Ky. Opin. 59.

Where one of two administrators acts for a short time only, he is not entitled to half the commission allowed for winding up the estate; he should be allowed one-half of the commission for that portion fully administered while he continued to act.

Shrader v. Phillips, 1 Ky. Opin. 513.

§ 497. Extra allowances.

Where a testator directed that his farm and other real estate should not be sold until his minor son should become of age, and that such real estate should be occupied as a home by his four daughters and infant son; and all the products of the farm and the stock on it were devised in the same manner, and the executors were to sell the land and personalty when the son should become of age and the proceeds be divided equally between all of his children, except that the minor son and each of the daughters were to have \$1,000 more than the other children, and the proceeds were to be loaned by the executors and the income be paid to each; but it was further provided that if a majority of the four daughters asked it to be done, the executors were to sell such estate at any time prior to the son becoming of age; and the executors purchased certain articles for the girls, expecting to pay for the same out of the proceeds from the farm, but before any proceeds were received they decided to have the property sold, it was held that from the income derived from

the funds of each of said daughters after such sale, the executors should be reimbursed for the expenditures made for each before the sale.

Bowman's Exrs. v. Bowman, 11 Ky. Opin. 859.

(E) STATING, SETTLING, OPENING, AND REVIEW.

§ 502. Form and requisites of account.

Where a suit was filed, in the nature of a bill quia timet, for the purpose of litigating the question of right to a debt collected by an administrator, there being a dispute between the heirs of two estates as to which it belonged; and the administrator of one of said estates joined the administrator and heirs of the other estate as defendants, all being alike interested; a demurrer thereto should not have been sustained.

Penn's Admr. v. Penny's Admr., 1 Ky. Opin. 435.

§ 504. Objections and exceptions.

Where claims of an administrator have been passed upon by a court of competent jurisdiction and pronounced valid, they should not be rejected in a suit to surcharge the settlement because of defects in affidavits attached thereto.

Million's Admr. v. Holeman, 7 Ky. Opin. 640.

Where a trustee has filed a report, it is the duty of those interested to examine it, and they are justified in failing to do so by what they are told by the trustee or others.

Best v. McIlvoy's Admr., 9 Ky. Opin. 302.

§ 506. Evidence.

Where in the settlement of an estate, the administrators had a commissioner appointed to render an accounting, and the report of the commissioner, though never confirmed and ordered to be recorded, was not excepted to by the complainants in an action against the administrators to settle the estate, but their bill was dismissed after the commissioner's report was filed, it constituted evidence against complainants, if not an absolute bar to a subsequent action.

Litsey's Exr. v. Hardin's Exr., 1 Ky. Opin. 440.

A settlement made by an administrator with the county court is prima facie right, but when the administrator seeks to subject land descended to the heirs and they surcharge the settlement and show errors, the prima facie presumption is greatly weakened.

Caldwell v. Caldwell's Heirs, 2 Ky. Opin. 369.

§ 507. Hearing or reference.

Where a surrender of a life estate by the owner to her children is made by a legatee, a settlement should be adjudged up to said surrender, in a suit against the bondsmen of the administrator for an accounting.

McGill v. Nelson, 2 Ky. Opin. 344.

§ 508. Order or decree.

Where the children of deceased sued the administrator de bonis non for settlement of the estate, and the trial court charged the administrator with all moneys and property which passed to the prior deceased administrator, and rendered a personal judgment against him for the whole amount, it was held that as there was no devastavit and no effort to have a settlement until suit was brought, the judgment should have been against the appellant as the administrator of his deceased father to be levied of assets in his hands as such.

Smith v. Norris Heirs, 5 Ky. Opin. 142.

§ 509. Opening or vacating.

A settlement by an administrator with the county court is prima facie correct, and credits allowed the administrator in such settlements can not be set aside on proof that the debts paid did not exist, or ought not properly to have been paid.

Graves v. Motherhead, 7 Ky. Opin. 212.

Where an administrator made a settlement of an estate showing that the estate owes him \$400, and then died, it was held that such settlement is prima facie evidence of its correctness, and the objections in the attempt to surcharge it must be specifically set forth, and the burden is on those attacking such settlement to make out the case,

and where many years have elapsed since such settlement, and the administrator is dead, every presumption should be indulged in favor of the representatives of the administrator that is reasonable and consistent with the facts proved.

Smith's Admr. v. Nuckols, 12 Ky. Opin. 366.

§ 511. Costs and expenses.

Where an administrator brings suit to settle the decedent's estate, all the cost should be paid out of the general estate.

Cummings v. Bradford, 5 Ky. Opin. 78.

§ 512. Operation and effect.

§ 513.—In general.

In the absence of proof, surcharging a county court settlement of an estate, it is prima facie evidence of its own correctness, and the party assailing it must be overcome by proof this presumption in its favor.

Bridges v. Burne, 4 Ky. Opin. 456.

After settlement with the county court, the executor holds funds belonging to the estate as trustee and not as executor.

Bowman v. Utley, 1 Ky. Opin. 443.

§ 516. Actions to open or set aside settlement.

An ex parte settlement by an administrator, with the county court, may be surcharged and corrected by the circuit court upon proper allegations and proof.

Gist v. Gist, Admr., 6 Ky. Opin. 209.

XII. FOREIGN AND ANCILLARY ADMINISTRATION.

§ 517. Foreign appointment.

The failure of a foreign administrator to execute a covenant to the commonwealth, as prescribed under the Act of February 28, 1854, § 2, is a fatal error, though the objection was not made in the court below.

Thomas v. Gentry, Admr., 3 Ky. Opin. 572.

XIII. LIABILITIES ON ADMINISTRATION BONDS.

§ 527. Nature and extent in general.

If there is unreasonable delay by an executor in attempting to make a collection and by reason of such delay the estate is lost by it, the executor is liable.

Edwards' Exx. v. Edwards, 8 Ky. Opin. 661.

An executor is not held to the exercise of more than ordinary diligence in securing the debts due the testator, and diligence does not require him to sue upon claims at the first term of court after he qualifies.

Edwards' Exx. v. Edwards, 8 Ky. Opin. 661.

Where an insolvent debtor to an estate has a claim against the estate, and the administrator fails to withhold money due to such debtor, but pays him in full and is unable to collect the debt due the estate, he is liable for negligence in having paid such debtor.

Jones' Admr. v. Shy's Admr., 8 Ky. Opin. 890.

Where there are joint administrators, each signing the bond with others, they become sureties for each other; and, when one resigns or is discharged as administrator, he is still liable on the bond.

Smith v. Shoeman, 9 Ky. Opin. 905.

The property of an executor's wife, who is also a devisee interested in the administration of the estate, is not liable to be taken by co-devisees to make good any losses they may have sustained through the default of the executor, their remedy being a suit on the executor's bond.

Page v. Holman, 9 Ky. Opin. 234.

One who has taken every required step to collect a debt, by bringing suit, taking judgment and issuing execution, can not be regarded as negligent, simply because he did not file the claim against an insolvent estate.

Eastin & Wilson v. Bierbowen & Wilson, 9 Ky. Opin. 758.

The sureties on an administrator's bond are not liable for the proceeds of land sold under a decree or judgment, although sold at the instance of the administrator.

Stuart v. Hathaway, 11 Ky. Opin. 800.

§ 528. Property covered.

Where by the terms of a will the interest from a certain sum of money is given to the widow, said sum being given to a husband and wife in a foreign state, and by agreement between said widow and the owners of the fund it is agreed that the husband shall take such money, not as trustee but as owner, and pay the widow the interest each year, and such fund never came into the hands of the executor of the will, he and his sureties are not liable to account therefor, upon the holder and owner of such fund becoming bankrupt.

Hessey's Exr. v. Hessey, 10 Ky. Opin. 902.

§ 529. Functions and acts covered.

The obligation of sureties on the bond of an administrator is to answer for the personal assets that come or ought to have come to the hands of the administrator and their liability can not be enlarged without their consent.

Stuart v. Hathaway, 11 Ky. Opin. 800.

§ 531. Discharge of sureties.

To entitle the sureties in a new bond to contribution from the sureties in the former bond, they must be brought before the court in the action in which they are defendants, and it is not the duty of the plaintiff in the action to do this for them.

Lockett v. Beavon, 4 Ky. Opin. 402.

A surety for an executor to whom a decedent's estate has been transferred, is discharged from all liability as such to a distributee, devisee or ward when five years shall have elapsed without suit after the cause of action accrued.

Hoskins v. Cook, 8 Ky. Opin. 851.

§ 537. Actions.

In an action on an administrator's bond, the mere allegation in substance

that the administrator executed the bond for the performance of his duties according to law, is a conclusion of law and insufficient, since it should appear from the petition what the stipulations of the bond are, so that the court may know whether liability exists.

Curds, Admr., v. Curds, Exr., 6 Ky. Opin. 442.

Where neither the terms nor the substance of an administrator's bond are set out in the petition, the filing of a copy of the bond with the petition does not dispense with the necessity of setting out the undertaking as entered in the pleading itself.

Reno v. Davis, 6 Ky. Opin. 537.

In an action by a legatee on the bond of the executor, the personal representatives of deceased legatees should be made parties.

Day v. Grady, 7 Ky. Opin. 603.

If suit on an executor's bond was not instituted within five years from the time when distribution should have been made, the sureties on the bond may defeat recovery by pleading the statute of limitations.

Day v. Grady, 7 Ky. Opin. 603.

XIV. EXECUTORS DE SON TORT.

§ 539. Operation and effect of unauthorized acts.

Where an executor in accepting the conveyance of a house and lot, acted for the estate, with reasonable prudence and discretion, loss resulting from the burning of the house should not fall on the executor, but upon the estate.

Graves v. Motherhead, 7 Ky. Opin. 212.

EXEMPLARY DAMAGES.

See Damages, V.

For assault and battery, see Assault and Battery, § 39.

Not recoverable in action on attachment bond, see Attachment, § 351.

EXEMPTIONS.

I. NATURE AND EXTENT.

(A) NATURE, CREATION, DURATION, AND EFFECT IN GENERAL.

§ 1. Nature of right.

§ 4. Construction of exemption laws in general.

(B) PERSONS ENTITLED.

§ 18. Housekeepers.

§ 20. Children.

§ 26. Residence.

(C) PROPERTY AND RIGHTS EXEMPT.

§ 32. Property within general exemption.

§ 33.—Nature in general.

§ 39. Food and provisions.

§ 46. Material and stock in trade.

§ 49. Pension money.

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§ 54.—In general.

III. WAIVER OR FORFEITURE.

§ 92. Contracts waiving prospective exemption.

§ 93. Acts or omissions constituting waiver in general.

§ 95. Consent to levy and sale.

IV. PROTECTION AND ENFORCEMENT OF RIGHTS.

§ 106. Statutory provisions.

§ 126. Selection.

§ 131. Denial or infringement of rights.

§ 133.—Levy on or sale of exempt property.

See Executors and Administrators, § 53; Homesteads.

Of agricultural land from municipal taxation, see Municipal Corporations, § 967.

Of bankrupt, see Bankruptcy, § 394.

I. NATURE AND EXTENT.

(A) NATURE, CREATION, DURATION, AND EFFECT IN GENERAL.

§ 1. Nature of right.

The right of exemption depends upon the present and actual purpose and intention of the debtor to use and enjoy the property sought to be exempted as a home for himself and family, and does not exist where the

residence of the debtor is permanently located elsewhere.

Wilson v. Stoner, 5 Ky. Opin. 751.

§ 4. Construction of exemption laws in general.

While exemption laws are entitled to a liberal construction, exemptions exist by virtue of the statute only and one to be entitled to their benefit must show that he comes within the meaning of the statute.

Hudspeth v. Harrison, 13 Ky. Opin. 25.

(B) PERSONS ENTITLED.

§ 18. Housekeepers.

In the absence of a contract by which a debtor is deprived of the right to claim an exemption against a debt, the only inquiry to be determined is whether the debtor is a bona fide housekeeper with a family resident in this state, and whether the thing claimed as exempt is embraced by the statute.

Patterson v. Mosby, 10 Ky. Opin. 576.

§ 20. Children.

The claims of a poor and indigent mother upon her son for support are greater than the claims of creditors.

Wade v. Lyman & Bronston, 7 Ky. Opin. 427.

§ 26. Residence.

If the actual residence of the husband is on the wife's land, he can not assert any claim to exemptions in land owned by him adjoining or elsewhere, nor is the court compelled in every judgment rendered to reserve the right of homestead in the land, when no such right is asserted.

Wilson v. Stoner, 5 Ky. Opin. 751.

(C) PROPERTY AND RIGHTS EXEMPT.

§ 32. Property within general exemption.

A housekeeper with a wife and children, is entitled to two work beasts, and the horse in question although only nineteen months old, and never having been worked, being of the species to which the execution applies,

and being intended for the use of the family, is exempt from execution.

McClanahan v. McGill, 1 Ky. Opin. 178.

Property that is exempt from liability for the debts of the husband, may be conveyed in trust for the use of the wife, and a subsequent attempt to create a lien upon same by the husband will not affect the title he had already conveyed.

Wright v. Nevill, 2 Ky. Opin. 286.

§ 33.—Nature in general.

If an execution debtor has not a sufficiency of provision to sustain his family one year, the officer collecting the execution must make up the deficiency of exempted property by setting apart to the debtor "so much of the live stock suitable for the purpose, and of the growing crop, if any, as may be necessary to supply it;" and if horses, etc., can not be taken out because unsuitable for food, and for the same reason tobacco, cotton and crops of that character can not be claimed by the debtor.

Russell v. Marr, 9 Ky. Opin. 592.

§ 39. Food and provisions.

Under the exemption law relating to bread stuffs and animal food, tobacco is not exempt as an article of food.

Stone v. Hales & Moss, 7 Ky. Opin. 110.

§ 46. Materials and stock in trade.

Lumber and materials of a cabinet maker, in his possession, are not exempt from levy under the statute.

Hicks v. Duggins, 4 Ky. Opin. 41.

§ 49. Pension money.

The bounty and back pay of a deceased soldier who died in service during the civil war, and which is made payable to the widow and children of such soldier, is not subject to the debts of the deceased soldier.

Avery v. Carter, 7 Ky. Opin. 200.

The exemption of pension money from liability for the debts of the pensioner does not extend beyond the time of its receipt by him.

Hudspeth v. Harrison, 13 Ky. Opin. 25.

Money received from the United States government as a pension is exempt from claims of creditors until it reaches the hands of the pensioner; after that it is liable for his debts, and so is property bought with it.

Herreld v. Skillem's Assignee, 13 Ky. Opin. 353.

Pension money, when it reaches the hands of the pensioner ceases to be secure from the creditor, and when invested in property such property may be sold to satisfy the creditors' claims.

Ashley v. Terry, 13 Ky. Opin. 405.

Money in the possession of the agents of the government or in transit to the pensioner can not be attached, but when received and deposited with or loaned to another, it may be attached or garnished, and when invested in real estate it may be subjected, although conveyed to the wife, nor can the homestead be relieved from the burden if acquired after the creation of the debt.

Carter & Co. v. Strange, 13 Ky. Opin. 650.

§ 53. Proceeds of exempt property.

§ 54.—In general.

It is the duty of one causing a levy to be made on exempted property to see that the proceeds are paid to the person entitled to such exemption.

Forsythe v. George, 10 Ky. Opin. 499.

III. WAIVER OR FORFEITURE.

§ 92. Contracts waiving prospective exemption.

A contract not to claim the benefit of the exemption is executory and does not bind the person entitled to the exemption.

Harrison's Trustee v. Kuntz, 8 Ky. Opin. 688.

§ 93. Acts or omissions constituting waiver in general.

One who stands by and permits his property to be sold without asserting any claim of exemption waives any such right of exemption.

Covert v. Bethel, 10 Ky. Opin. 50.

The failure of a defendant in a proceeding under a distress warrant to bring an action to recover the possession of exempted corn taken under the warrant, or to execute a bond and move for a judgment on it, and for judgment that the corn was exempt, amounts to a waiver of the defendant's exemption rights.

Connor v. Botts, 11 Ky. Opin. 132.

§ 95. Consent to levy and sale.

A debtor may protect his surety in a replevin bond by surrendering to the sheriff property exempt from execution, and after the sheriff has accepted such property to be sold in satisfaction of the debt, it is then too late for such debtor to object to such property being sold.

Ponder v. Webb, 10 Ky. Opin. 745.

IV. PROTECTION AND ENFORCEMENT OF RIGHTS.

§ 106. Statutory provisions.

The court will give a liberal construction to statutory provisions relating to exemption of property for the benefit of housekeepers.

Stone v. Hales & Moss, 7 Ky. Opin. 110.

§ 126. Selection.

A judgment defendant has a right to elect what property he will retain under his exemption against an execution, and when he elects to retain a certain horse, but the sheriff levies upon and sells it first, taking an indemnity bond from the plaintiff, the debtor is entitled to recover the value of the property upon the bond given.

Westerfield v. Moreland, 11 Ky. Opin. 247.

§ 131. Denial or infringement of rights.

§ 133.—Levy on or sale of exempt property.

Where a creditor sells property of the debtor which is exempt from sale, the creditor may be required to account for the value of the property thus sold.

Levell v. Elliott, 7 Ky. Opin. 469.

EXHIBITS.

See Pleading, § 307.

Action on note, see Bills and Notes, § 488.

Aid to pleading, see Pleading, § 310.
 Curing defect in petition, see Pleading, § 400.
 Variance between pleading and exhibit, see Pleading, § 394.

EXPATRIATION.

See Citizens, § 13.
 As a punishment, see Citizens, § 13.

EXPENSES.

Of administration, see Executors and Administrators, § 482.

EXPERTS.

Opinions of, see Criminal Law, § 482;
 Evidence, § 569.

EXPRESS COMPANY.

Loss of goods by robbery, see Carriers, § 118.

EXTORTION.

§ 11. Penalties and actions therefor.
 A petition to recover back money obtained by extortion under color of legal proceedings, held insufficient and subject to demurrer.
Griffith v. McDaniel, 6 Ky. Opin. 203.

FACTORS.

Duties of commission merchant, see Principal and Agent, § 48.
 Liability for negligence in selling, see Principal and Agent, § 79.
 § 1. Who are factors.
 A factor is one who may buy and sell in his own name as well as in the name of his principal, and is intrusted with the possession, management, control and disposal of the goods to be bought and sold, and has a special property in them.

Graham & Co. v. Duckwall, Fitch & Co., 5 Ky. Opin. 495.

FALSE IMPRISONMENT.

I. CIVIL LIABILITY.

(A) ACTS CONSTITUTING FALSE IMPRISONMENT AND LIABILITY THEREFOR.

§ 9. Defenses.
 § 12.—Judicial process.

(B) ACTIONS.

§ 20. Pleading.
 § 37. Trial.
 § 40.—Instructions.

I. CIVIL LIABILITY.

(A) ACTS CONSTITUTING FALSE IMPRISONMENT AND LIABILITY THEREFOR.

§ 9. Defenses.
 § 12.—Judicial process.

A defendant to a suit for false imprisonment, who is a constable acting under an order of a judicial tribunal, and who served a writ valid on its face, issued to him by a judge, as to whom it is not averred that he did not have jurisdiction to issue, is not liable.
Parker v. Hamilton, 13 Ky. Opin. 295.

(B) ACTIONS.

§ 20. Pleading.
 A petition for false imprisonment is bad where it shows that the imprisonment was upon a commitment from a justice of the peace, and there is no averment that the justice acted corruptly.

Westersthorn v. Dunleavy, 9 Ky. Opin. 635.

A petition for false imprisonment against a justice of the peace is insufficient which alleges only that plaintiff "was wantonly, maliciously and unlawfully arrested and deprived of his liberty, by the defendants (naming them) on the false and pretended charge of a contempt offered to the court of the defendant (naming him); that by reason of said wanton and malicious acts of defendants plaintiff was damaged in the sum of one thousand dollars," since such a petition fails to allege that the justice had no jurisdiction in the matter, and it is

not made good by the allegations of the answer.

Parker v. Hamilton, 13 Ky. Opin. 295.

§ 37. Trial.

§ 40.—Instructions.

In an action for false imprisonment, where the plaintiff's own evidence shows that he invited the arrest and courted the imprisonment, it is not error to give a peremptory instruction for the defendant.

Chelf v. Austin & Averill, 4 Ky. Opin. 171.

FALSE PRETENSES.

§ 3. Elements of offenses.

§ 4.—In general.

§ 7.—Nature of pretense.

§ 8.—Falsity of pretense and knowledge thereof.

§ 25. Indictment or information.

§ 26.—Requisites and sufficiency in general.

§ 3. Elements of offenses.

§ 4.—In general.

Special damages in a case like this can be recovered only where the false representations are made maliciously and with intent to injure, and it must appear that actual injury was thereby done, and it is not enough to charge that a creditor is induced to sue and attack by reason of false and malicious representations, it must be alleged that the attachment was discharged on the hearing of the case.

Kenner v. McIntyre, 5 Ky. Opin. 527.

§ 7.—Nature of pretense.

Before one can be convicted of violating the statute against obtaining property by false pretenses, it must be shown that the false pretenses of statements made were as to a fact in the past or present, and not of something to be done in the future; and it must be shown that those parting with their property had no knowledge of the falsity of the statements made.

Commonwealth v. Thompson, 9 Ky. Opin. 932.

§ 8.—Falsity of pretense and knowledge thereof.

Where appellant pretended to sell whiskey for appellee at \$1.50 per gallon to induce him to accept the supposed price under the mistaken belief, wrongfully induced by appellant, that he had in good faith sold the whiskey at that price to another, with the intention to profit by this imposition, and the appellant did so profit by the sale of the whiskey at a greatly advanced price, appellee may recover the value of the whiskey at the time of the pretended sale from appellant and those in combination with him in the perpetration of the fraud.

Kennady v. Jordan, 1 Ky. Opin. 216.

§ 25. Indictment or information.

Where the indictment charges that the defendant willfully and knowingly misrepresented the number and quality of the watches and chains contained in a box, and the genuineness of the note on G, by said misrepresentation as to the value of the property delivered he deceived E as to his ability to repay the loaned money; and the offense was sufficiently charged.

Converse v. Commonwealth, 5 Ky. Opin. 228.

§ 26.—Requisites and sufficiency in general.

It is not sufficient in an indictment for obtaining money by false pretenses, to aver that the representations made were false, but it must be alleged in addition that the defendant knew them to be false.

Martin v. Commonwealth, 8 Ky. Opin. 400.

FALSE REPRESENTATIONS.

By purchaser, see Sales, § 42.

FALSE SWEARING.

See Perjury.

FEES.

Attorney's fees, see Attorney and Client, IV.

Clerks of courts, see Clerks of Courts, § 10.

Contingent fee, see Attorney and Client, §§ 146, 149.

Of county attorney, see District and Prosecuting Attorneys, § 4.

Of court stenographer, see Costs, § 189.

Witness fees, see Witnesses, § 23.

FEE SIMPLE.

See Deeds, § 124; Estates, § 5.

Wills, §§ 596, 597; Conditional fee, see Wills, § 603.

Qualified or defeasible, see Wills, § 602.

Title by adverse possession, see Deeds, § 124.

FENCES.

§ 11. Division of partition fence between landowners.

§ 12.—In general.

§ 26. Removal or destruction of fences.

Duty to construct and maintain fence, see Railroads, § 411.

Liability for failure to erect fence, see Railroads, § 103.

§ 11. Division of partition fence between landowners.

§ 12.—In general.

A verbal agreement by adjoining landowners to each maintain a designated portion of a partition fence does not run with the land and is not binding on the grantees of either of the parties to such agreement.

Broaddus v. Easter, 8 Ky. Opin. 537.

An agreement between the owners of adjacent lands for erecting and keeping up a division fence, only runs with the land, when reduced to writing and signed, acknowledged and recorded as prescribed by the statutes.

Broaddus v. Easter, 8 Ky. Opin. 537.

Adjoining landowners in maintaining a partition fence are each bound to keep up a lawful fence on their respective portions, and where one owner fails to do so, and his cattle break through and damage the other, such person so failing is liable for such

damages if the other owner has maintained his portion of such fence.

Mitcheson v. Norse, 9 Ky. Opin. 683.

§ 26. Removal or destruction of fences.

Where an owner of land permits an adjacent owner to join his fence to the former's gate, thereby enclosing the latter's land, the former can not legally enter and remove the gate without reasonable notice to the latter of his intention to remove it.

Burries v. Agnew, 6 Ky. Opin. 10.

FERRIES.

I. ESTABLISHMENT AND MAINTENANCE.

§ 1. Right to establish and maintain in general.

§ 9. Franchises and privileges.

§ 21. Location.

II. REGULATION AND OPERATION.

§ 33. Actions for injuries.

§ 34. Penalties for violations of regulations.

I. ESTABLISHMENT AND MAINTENANCE.

§ 1. Right to establish and maintain in general.

The transportation of persons across the Cumberland river at a point within one mile of an established ferry, for the purpose of trading with the transporter is a transportation for a reward within the meaning of Gen. Stat. 1881, ch. 19, § 42, and such merchant may be enjoined from making such transportations.

Kevill v. Wharton, 12 Ky. Opin. 339.

§ 9. Franchises and privileges.

Where both parties assumed that a legal ferry already existed at or near the point proposed, and the ground of controversy is as to which of them owns the privilege, the question can not be settled in a proceeding commenced in the county court upon a motion to establish a new ferry.

Gresham v. Gresham, 5 Ky. Opin. 665.

§ 21. Location.

Under a law that no ferry shall be established within less than a mile of

the place, in a straight line, of any other ferry, unless it be in a town or city, or where an impassable stream intervenes, it is held that a second ferry may be established at a town of one hundred thirty inhabitants, where there is already a ferry within one mile but which can only be reached by traveling a distance of more than one mile because of an impassable ravine in which is a small stream of water.

Southworth v. Lutch, 12 Ky. Opin. 123.

II. REGULATION AND OPERATION.

§ 33. Actions for injuries.

In the absence of an order of the county court permitting plaintiff as relator to sue the defendant ferryman, plaintiff must disclose some interest in himself, showing that his rights have been affected in some way because of the failure of defendant to conduct and keep his ferry as required by law, plaintiff's remedy for mere injury to himself being by acting on the ferryman's bond, and not the revocation of the license.

Commonwealth v. Little, 6 Ky. Opin. 440.

§ 34. Penalties for violations of regulations.

Where, in a proceeding against a ferryman for failure to comply with the law, the charge is a general one that defendant has failed to comply with the law, it is too general and indefinite to support the proceeding.

Commonwealth v. Little, 6 Ky. Opin. 440.

FIDUCIARY RELATION.

See Attorney and Client; Fraudulent Conveyances, I, F; Guardian and Ward; Husband and Wife; Parent and Child; Trusts.

FILING.

Bill of exceptions, see Exceptions, Bill of, §§ 38, 57.

Waiver of omission to mark answer filed, see Pleading, § 405.

FILING AWAY.

Of civil causes, see Dismissal and Nonsuit, § 60.

Of indictment—Effect, see Criminal Law, § 303.

FINALITY.

Of determination, see Appeal, § 66.

FINAL JUDGMENTS.

See Appeal, III, D.

Finality as to all parties, see Appeal, § 79.

FINDINGS.

By court, when treated as verdict of jury, see Appeal, § 135.

Consideration of on appeal, see Appeal, §§ 1007, 1010.

Of court—Conclusiveness, see Appeal, § 1008.

Of court Commissioner, see Court Commissioners, § 5.

Of court have weight of verdict, see Appeal, § 931.

Of referee or commissioner, see Appeal, §§ 1016, 1017.

Presumption that evidence supports, see Appeal, § 907.

Special findings by jury, see Trial, § 349.

When not disturbed on appeal, see Appeal, § 1010.

FIRES.

See Negligence, § 21; Railroads, X, I. Care required of railroad company to prevent fire, see Railroads, § 453.

Right to destroy building to arrest conflagration, see States, § 86.

FIXTURES.

§ 13. Between landlord and tenant and their privies.

§ 15.—Trade fixtures.

§ 21. Between vendor and purchaser of land and their privies.

§ 35. Actions relating to fixtures.

§ 13. Between landlord and tenant and their privies.**§ 15.—Trade fixtures.**

Under the law of fixtures it is held that the placing on the premises by the lessee of implements for the purpose of operating mines thereon under the contract of lease, would not give the owner of the freehold a claim to the fixtures, when they can be removed without causing material injury to the estate, since they remain the unquestionable property of the lessee.

Mead v. Lansdowne, 2 Ky. Opin. 279.

Where a contract for the lease of a salt mine, amongst others, contained the following clause: "Any materials and implements the said Mead may place upon the premises for the manufacture of salt, and not counted fixtures, he, Mead, shall have the right to remove for his use, unless said Dr. Lansdowne chooses to pay said Mead for the same at a fair valuation;" this will not vary the legal signification of the term "fixtures," the implements being merely erected for the purpose of trade, were subject to removal by the tenant.

Mead v. Lansdowne, 2 Ky. Opin. 279.

§ 21. Between vendor and purchaser of land and their privies.

Where land is conveyed on which is located a mill, in which is machinery, and no lien is reserved on such machinery, the person receiving such conveyance is not guilty of conversion by selling the same.

Finnell v. Sage, 9 Ky. Opin. 249.

Neither a flouring mill nor the machinery in it is a fixture, and where land is sold on which is located such a mill, the mill and machinery go with the land, where not reserved in the conveyance.

Finnell v. Sage, 9 Ky. Opin. 249.

When chattels are attached to the realty or adapted to use in connection with the purpose for which the premises are being used and for which they are specially adapted, such chat-

tels must be regarded, between vendor and vendee, as fixtures.

Kinnaird v. Shannon, 10 Ky. Opin. 212.

§ 35. Actions relating to fixtures.

Whether structures and machinery attached to land mortgaged or sold are real or chattel fixtures, is a question of fact.

Gaines v. Scales, 6 Ky. Opin. 479.

FOOD.

Exemption from execution, see Exemptions, § 39.

Right to sell fruits preserved in liquor, see Intoxicating Liquors, § 132.

FORBEARANCE.

As consideration for contract, see Contracts, § 70.

FORCIBLE ENTRY AND DETAINER.**I. CIVIL LIABILITY.**

§ 3. Right of entry to take possession without action.

§ 7. Grounds of action in general.

§ 10. Right of plaintiff to possession.

§ 14. Persons entitled to sue.

§ 15. Persons against whom action may be brought.

§ 18. Parties.

§ 22. Pleading.

§ 29. Evidence.

§ 30. Damages.

§ 31. Trial.

I. CIVIL LIABILITY.

§ 3. Right of entry to take possession without action.

An owner of land may take possession of premises where he has been dispossessed by a mere trespasser who sets up no claim to the land.

Sandford v. Kemper, 6 Ky. Opin. 375.

Right of possession is the gist of the action of forcible detainer, and a verdict and judgment for restitution is a complete bar to suit for acts done in the prudent execution of the writ.

Gore v. Bates, 9 Ky. Opin. 171.

§ 7. Grounds of action in general.

The mere holding over by a tenant after the expiration of his term, is not a forcible detainer, and a warrant will not lie until there has been a refusal to surrender possession.

Kennedy v. Collins, 6 Ky. Opin. 157.

If one is in the actual possession of land, the fact that a prior trespasser gets possession, does not render the entry of a subsequent trespasser less forcible and wrongful than the entry of the first party named, and he may maintain a writ of forcible entry against the last trespasser.

Alexander v. Fowler, 13 Ky. Opin. 886.

§ 10. Right of plaintiff to possession.

Where a transaction merely amounted to an agreement whereby S was to act as G's agent, entry on the land by G was not unlawful, and will not sustain an action for forcible entry and detainer.

Smith v. Gray, 7 Ky. Opin. 75.

The appellant entered under a contract as tenant with the privilege to purchase the land by paying the specified sum on a day named, and, failing to comply, he thereby elected to hold as tenant, and, having refused to surrender possession at the end of the year, he subjected himself to be proceeded against as a forcible detainer.

Hill v. Morris, 5 Ky. Opin. 355.

A forcible entry is an entry on land or tenements without the consent of the person having the possession in fact of the premises.

Price v. Gatt, 5 Ky. Opin. 572.

Where appellant having entered and held the land in dispute, as the appellee's tenant in 1869, and during that year verbally negotiated for a renewal of his lease for 1870, but on the first day of that year refused to execute the new contract, and openly disclaimed to hold under the appellee and asserted claim to the possession exclusively as the tenant of another, refusing to make restitution of the premises to appellee, he is liable to the proceeding by warrant for forcibly detaining the possession.

Poston v. Mercer, 5 Ky. Opin. 565.

Forcible detainer is the refusal of a tenant to surrender to his landlord the lands or tenements demised, after the expiration of his term.

Price v. Gatt, 5 Ky. Opin. 572.

In an action for forcible entry, the question as to which party is legally entitled to the possession can not be considered, and it is immaterial whether plaintiff's possession was right or wrong, if it was proved to be actual.

Sandford v. Kemper, 6 Ky. Opin. 239.

§ 14. Persons entitled to sue.

An action for forcible entry will not lie in favor of one who gains possession merely as an interloping rambler, or as a mere scrambling possession.

Sandford v. Kemper, 6 Ky. Opin. 239.

A mere contract for a lease without an entry does not vest the possession in the lessee, consequently he can not maintain an action for forcible entry, the right of action being in the landlord.

Crawford v. James, 3 Ky. Opin. 587.

Where an action of forcible entry and detainer was instituted, and, before trial, the defendant died and the action was revived against the administrator; and later the plaintiff having died, the heirs moved the court to prosecute the action, which was denied; the landlord would have the right of possession, which descended to his heirs, and they could prosecute the action in their name.

Sneed's Heirs v. Payne's Admr., 3 Ky. Opin. 660.

None but those who are in actual possession when a forcible entry is made have a right to the warrant of forcible entry under the statutes.

Caskey v. Spradlin, 4 Ky. Opin. 680.

§ 15. Persons against whom action may be brought.

The mere fact of possession of land without the claim of right will not

make the entry of the tenant a forcible entry.

Sandford v. Kemper, 6 Ky. Opin. 375.

The warrant of forcible detainer is the proper remedy to secure the possession of real estate held by a tenant under a written lease, when possession is refused at the expiration of the tenancy.

Walker v. Bush, 13 Ky. Opin. 160.

§18. Parties.

Where a wife had the right to the rents and the use of premises, the trustee holding only the naked legal title, the warrants were properly issued in the name of the husband and wife.

Robards v. Mason, 7 Ky. Opin. 285.

§22. Pleading.

The statute requires that the traverse bond must be given to the adversary of the party traversing within three days after the finding of the jury.

Garrett v. Phillips, 5 Ky. Opin. 622.

§29. Evidence.

On a traverse of the finding of a jury in the country, a commissioner's deed of partition, by which the premises in contest were assigned to traverse, may be admitted as evidence to establish boundary and elucidate possession.

Gasney v. Downton, 3 Ky. Opin. 631.

In an action for forcible detainer, if the cause of action existed when plaintiff sued out the warrant, evidence tending to prove what improvements he had made subsequent thereto, is admissible, in an action for damages, in mitigation, but not to defeat the action after it has been brought on an existing cause.

Brown v. Parker, 3 Ky. Opin. 688.

In a suit of unlawful entry and detainer, it is error to permit the defendant to show or prove by witness, what improvements he had made after the commencement of the action.

Brown v. Parker, 3 Ky. Opin. 688.

If a right of action for forcible entry and detainer existed at the time of suing out the warrant, evidence as to improvements made by defendant after commencement of the action is incompetent.

Brown v. Parker, 3 Ky. Opin. 688.

§30. Damages.

It is the province of the jury to fix the amount of damages in a suit for forcible ejection, and it is only when such damages are excessive and appear to have been given under the influence of passion and prejudice or when improper evidence bearing upon the measure of damages is permitted to go to the jury that the Court of Appeals is authorized to interfere on account of the damages awarded.

Payson & Lyon v. Holden, 11 Ky. Opin. 771.

§31. Trial.

Where the evidence conduces to the conclusion that a tenant had not made the improvements covenanted, a peremptory instruction for the defendant is improper.

Brown v. Parker, 3 Ky. Opin. 688.

Plaintiff having selected his adversary and executed a traverse bond to him, he is estopped to deny that the finding was for plaintiff in the country.

Garrett v. Phillips, 5 Ky. Opin. 624.

FORECLOSURE.

Conditions precedent to, see Mortgages, § 414.

Of chattel mortgages, see Chattel Mortgages, IX.

Of mortgages, see Mortgages, X.

Of mortgage under power of sale, see Mortgages, IX.

Persons entitled to foreclosure, see Mortgages, § 417.

Right of junior incumbrancers, see Mortgages, X.

FOREIGN CORPORATIONS.

Right to carry on business within the state, see Corporations, XII.

FOREIGN GUARDIAN.

Actions by, see *Guardian and Ward*, § 170.

FOREIGN JUDGMENT.

See *Judgment*, XVII, XXI, B.

FORFEITURES.

Of bail bond, see *Bail*, § 77.

Of insurance policy, see *Insurance*, X.
Of membership, see *Beneficial Associations*, § 10.

Of usurious interest, see *Usury*, § 146.
Pleading excessive rate of interest as forfeiture, see *Usury*, § 144.

Proceeding to forfeit bail bond, see *Bail*, § 82.

Relief from forfeiture of bail bond, see *Bail*, § 78.

§ 4. Grounds in general.

The object of the forfeiture or its being made a part of the contract, was to insure its fulfillment, and when this is the case and the party seeking the forfeiture has his remedy to recover damages by suit, the forfeiture, which amounts to a penalty only, can not be enforced.

Lee v. Davis, 5 Ky. Opin. 617.

Extenuating circumstances, as to the forfeiture of the whole price received from the sale by a legatee, where there is a remainder interest in the property, may arise so as not to deprive him of that part of the use which would have inured to his benefit.

McGehee v. Ditto, 2 Ky. Opin. 614.

FORGERY.

§ 3. Elements of offenses.

§ 5.—Intent.

§ 7.—Nature of instrument.

§ 25. Indictment or information.

§ 26.—Requisites and sufficiency in general.

§ 28.—Description of or setting forth instrument.

§ 30.—Making or alteration of instrument.

§ 34.—Issues, proof, and variance.

§ 35. Presumptions and burden of proof.

§ 36. Admissibility of evidence.

§ 37.—In general.

§ 45. Trial.

§ 48.—Instructions.

§ 3. Elements of offenses.**§ 5.—Intent.**

In a prosecution for forgery, it is enough to show that the accused committed the forgery for the fraudulent purpose of obtaining the possession of money or property, and it is not required that the party to whom the forged instrument was offered should have received it as genuine or believed it was genuine.

Doss v. Commonwealth, 9 Ky. Opin. 909.

§ 7.—Nature of instrument.

A receipt is a writing of a character which is subject to forgery.

Warmouth v. Commonwealth, 12 Ky. Opin. 387.

§ 25. Indictment or information.**§ 26.—Requisites and sufficiency in general.**

An indictment for executing a forged note is fatally defective, when it fails to allege that the note was not a genuine note, or that the accused knew it to have been a forgery.

Miles v. Commonwealth, 8 Ky. Opin. 385.

An indictment is defective when it attempts to charge forgery but only charges in substance that the commonwealth accuses the defendant of the crime of forgery, by forging the names of John Glenn and Hilry Bell to a note; since such a charge fails to set out how the offense was committed, and no facts are pleaded from which it may appear that a crime has been committed.

Snyder v. Commonwealth, 9 Ky. Opin. 29.

An allegation in an indictment that the accused falsely and fraudulently forged the name of a given person by signing his name to a certain paper, is not good: but the charge should show that the name was signed by the accused without the knowledge,

consent or authority of the person whose name was used.

Smith v. Commonwealth, 10 Ky. Opin. 349.

An indictment attempting to charge forgery is insufficient which only charges that the accused "did unlawfully forge an instrument," etc., and the further allegation that "this writing was so forged and falsely made," since such allegations state only conclusions of law, and not statements of facts required by the code.

Commonwealth v. Martin, 10 Ky. Opin. 680.

An indictment for forgery will be upheld as against a motion in arrest of judgment, when it states acts constituting the offense of forgery, in such manner as to enable a person of common understanding to know what was intended, and is certain enough for the court to pronounce judgment, on conviction, according to the right of the case.

Holdsworth v. Commonwealth, 13 Ky. Opin. 291.

An indictment for forgery is sufficient which charges that the accused signed the name of another to an order for goods without any authority of the person whose name he signed to the order, and presented the order and obtained four dollars' worth of goods with intention to defraud.

Linville v. Commonwealth, 13 Ky. Opin. 525.

Where an indictment has but one count, and charges one with forging an instrument, and then adds allegations as to what the accused did with the instrument, it charges but one offense, that of forgery, the other allegations being surplusage.

Rawlins v. Commonwealth, 13 Ky. Opin. 918.

Under statute (Gen. Stat. 1883, ch. 29, art. 10, § 1) defining forgery, providing that "If any person shall forge or counterfeit a bank bill or note or check, or draft upon a bank, * * * or company authorized by law of the United States or any state of the United States, * * * or any indorsement thereon" shall be fined and im-

prisoned, an indictment is not sufficient which fails to allege that the bank upon which a check was forged was at the time a bank authorized by law of the United States or by any state of the United States.

Rawlins v. Commonwealth, 13 Ky. Opin. 918.

§ 28.—Description of or setting forth instrument.

An indictment is sufficient which sets out a writing of a certain import in *haec verba* and charges that it "was forged and uttered with the design to defraud the Clark County National Bank."

Stone v. Commonwealth, 10 Ky. Opin. 670.

Where in an indictment for forgery a party is charged with obtaining money by means of the forgery, or where the forgery is perpetrated for that purpose, the indictment must allege the contents of the writing or at least the substance of the instrument that the court may know that the execution of the paper amounts to a forgery.

Wormoth v. Commonwealth, 11 Ky. Opin. 670.

§ 30.—Making or alteration of instrument.

An indictment for forgery, which does not aver that the writing was forged or that the defendant signed another's name to the writing, but alleges that the writing was signed without the authority of the person whose name is subscribed to it, is insufficient, the fraud being charged against the person who signed another's name to a writing, and it not being charged that the defendant signed such name.

Dors v. Commonwealth, 9 Ky. Opin. 712.

§ 34.—Issues, proof, and variance.

Where the accused is charged with forgery of a note, he can not be convicted of altering a forged note, and an instruction to that effect is erroneous.

Snyder v. Commonwealth, 9 Ky. Opin. 29.

§ 35. Presumptions and burden of proof.

Where, in a prosecution against an accused for forging an assignment of a note it is shown that the note came into his possession lawfully, the law presumes that it belongs to him, and if so he has a right to sell it, and hence the offer to sell is not evidence of fraud.

Flaughner v. Commonwealth, 10 Ky. Opin. 665.

§ 36. Admissibility of evidence.**§ 37.—In general.**

Where an accused is charged with forging an assignment of a note, evidence of attempts to sell the note is not admissible, and an instruction to the jury to the effect that if the accused uttered it by offering to sell it he was guilty, is erroneous.

Flaughner v. Commonwealth, 10 Ky. Opin. 665.

§ 45. Trial.**§ 48.—Instructions.**

An instruction "that fraud or forgery is not to be presumed but must be proved," were qualified by the proof of what was said and admitted as evidence on the issue of fraud, and the whole of which was before the jury, would not lead them to understand that forgery must be proved by positive and direct testimony and that it could not be inferred from the proof of facts.

Lindenberger v. Hurlburt, 2 Ky. Opin. 175.

FORMER JEOPARDY.

See Criminal Law, VII.

Plea of, see Criminal Law, § 292.

FRANCHISE.

§ 4. Exclusiveness and conflicting grants.

§ 6. Transfer or incumbrance.

§ 8.—Sale or assignment.

§ 4. Exclusiveness and conflicting grants.

In granting a right to build locks or bridges or operate a ferry, or in granting other franchises, the state does not deprive itself of the power

to construct other facilities of trade and travel, although the exercise of the power may result in individual loss and injury; since by such a grant the state enters into no agreement, express or implied, that the rights of the grantee shall not be impaired or the profits of their franchise may not be lessened by future legislation or by other grants, and the state is not liable for damages to the holders of the first grant by reason of such legislation or other grants.

Commonwealth v. Stevens, 11 Ky. Opin. 114.

§ 6. Transfer or incumbrance.**§ 8.—Sale or assignment.**

A franchise to build and operate a turnpike road can not be made the subject of sale in the absence of some special legislation authorizing it.

Old State Road & Ripple Creek Tpk. Co. v. Smith, 10 Ky. Opin. 624.

FRAUD.**I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.**

§ 1. Nature of fraud.

§ 5. Elements of constructive fraud.

§ 7.—Fiduciary or confidential relations.

§ 8. Fraudulent representations.

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§ 38. Time to sue and limitations.

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See Assignments for Benefit of Creditors, I, E; False Pretenses; Limitation of Actions, § 37.

Answer setting up fraud as defense to note, see Bills and Notes, § 477.

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As ground for cancellation of deed, see Cancellation of Instruments, § 3.

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Concealment of defects, see Sales, § 37.

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False representations by insured, see Insurance, §§ 252, 254.

False representations by purchaser, see Sales, § 42.

General allegation of fraud, see Judgment, § 372.

Limitation of action for fraud or mistake, see Limitation of Actions, §§ 48, 60, 99.

Misrepresentations by vendor, see Vendor and Purchaser, §§ 32, 38.

Plea of fraud in sale of goods, see Sales, § 37.

Setting aside sale of land for fraud, see Vendor and Purchaser, § 32.

Use of trade-mark, see Trade-Marks and Trade-Names, § 85.

Vacation of judgment for fraud, see Judgment, §§ 372, 386.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.**§ 1. Nature of fraud.**

Where a person procures the assignment of a note to himself, though it be not understood by the assignor, it being as security for advances made by the assignee, no fraud can be charged in the transaction.

Tupman v. Ducker, 4 Ky. Opin. 434.

§ 5. Elements of constructive fraud.**§ 7.—Fiduciary or confidential relations.**

The relation of trust and confidence between a brother and a sister, where the brother has had charge of her property and been collecting her rents, is such that if the sister signs a settlement sheet purporting to be a full and complete settlement between them, she will still not be precluded from the right to compel her brother to account for all money coming to his hands belonging to her, as such a final settlement is not binding upon her when she shows that it was not understood by her.

Laird v. Laird, 13 Ky. Opin. 256.

§ 8. Fraudulent representations.

Where the appellee upon the reception of a fraudulent letter as to the value of the land, proceeded to the home of the appellant and there upon the faith of such letter contracted to pay for the land ten times its value, a chancellor will not permit such an inconceivable bargain brought about by such fraudulent means to remain obligatory.

Adams v. McBarr, 5 Ky. Opin. 88.

§ 9.—Nature in general.

Where a widow, the day after the funeral of her husband and while in deep distress, being unable to read and write and without any information that she was the owner of one-third of her late husband's estate, was prevailed upon by his children, who knew that she was the owner of such one-third interest, to sign an agreement relinquishing her interest worth about \$25,000, in consideration of about \$7,000, and where she was induced to enter into it by the wrongful and false representations of the children, such agreement will be set aside.

Johnson v. Corbett, 12 Ky. Opin. 202.

To enable a vendee of real estate to obtain relief against a suit for purchase-money upon the ground of fraudulent representations by the vendor in respect to the property, in addition to allegations and proof that such representations were false, they must also be shown to be material, precise

and definite, and that they influenced and induced the sale.

Jameson's Admr. v. Richardson,
13 Ky. Opin. 912.

§ 11.—Matters of fact or of opinion.

In a suit growing out of a sale of stock in a corporation, the price at which stock was selling was a fact capable of being known, and one who for a fraudulent purpose affirms that a named article is selling for so much in the market, when he knows it is selling for a less price, or is ignorant of the price, is guilty of legal fraud, and can not escape liability on the ground that the other party might, by proper precautions, have learned that his statement was untrue.

Bowman v. Van Pelt, 9 Ky. Opin.
884.

A mere representation of the value of an article is not such a representation of a fact as will, if false, amount to a fraud in law.

Bowman v. Van Pelt, 9 Ky. Opin.
884.

§ 19. Reliance on representations and inducement to act.

§ 23.—Relations and means of knowledge of parties.

The relationship between the parties, when proven, is of little value as evidence of fraud in a transaction.

Hamilton's Assignee v. Winston,
10 Ky. Opin. 355.

§ 25. Injury from fraud.

Before one can have relief because of a fraudulent representation, it must be shown that he was misled to his prejudice, and also that the misrepresentation superinduced the agreement.

First National Bank of Franklin v.
Ford & Bros., 10 Ky. Opin. 251.

§ 29. Persons entitled to sue.

The irregularity of the entry of one into possession of land, if any existed, will not be inquired into on behalf of one obtaining a patent for such land which he knows has been entered by some one else, and who seeks to hold the land upon the theory alone of an irregularity in the character of the entry made by the actual occupant, unless the provisions of the statute are strictly followed.

May v. Hamilton, 13 Ky. Opin. 479.

II. ACTIONS.

(A) RIGHTS OF ACTION AND DEFENSES.

§ 36. Defenses.

One party litigant can not set up and rely on an alleged fraud against another party as a cause of action, where such other party is making no complaint.

Peabody v. Aldridge, 9 Ky. Opin.
516.

One not a party to a judgment is not estopped by it to set up and rely on the fraud which originally infected the note upon which judgment was entered.

McClelland v. Sweezy's Admr., 9
Ky. Opin. 611.

Where the note on which a judgment is rendered was fraudulent, and the appellant is a party to it, he can not set up the fraud to resist an action in equity to enforce satisfaction of the judgment.

McClelland v. Sweezy's Admr., 9
Ky. Opin. 611.

An action alleging merely a warranty of personal property as to its quality or soundness is no bar to an action for fraud in the sale, and a bill to revise a contract upon equitable grounds, where not based upon fraud, is no bar to an action at law for the fraud.

Cline v. Smith, 13 Ky. Opin. 50.

§ 38. Time to sue and limitations.

Relief for fraud or mistake must be commenced by action within five years after the cause of action accrues, and the cause of action is not deemed to have accrued until the discovery of fraud or mistake, provided it is brought within ten years after making of the contract.

Jones v. Talbott's Admr., 5 Ky.
Opin. 37.

Where a party commits a fraud and has concealed it to prevent the enforcement of a remedy, the remedy stands unaffected by the fraud, as if it had not been committed and no one deceived by it.

Adams & Bendix v. Buchner, 10
Ky. Opin. 363.

(B) PARTIES AND PLEADINGS.**§ 39. Parties.**

The widow and heirs of a debtor may maintain an action against his creditor for fraud in having a case redocketed after the debtor moved from the state, procuring a judgment much larger than the debt and causing the debtor's land to be sold therefor.

Pryse v. Hamilton, 13 Ky. Opin. 817.

§ 40. Pleading.**§ 41.—Allegations of fraud in general.**

The allegation that the mortgage in question was made in good faith to secure a pre-existing liability is not objectionable as an affirmative denial of fraudulent intent.

Opal v. Eckert, 6 Ky. Opin. 452.

A defendant will not be permitted to prove facts not alleged in the answer, and to prove fraud in a bond for title, it must be alleged in the answer that fraud had been committed.

Pack v. Lingenfelter, 3 Ky. Opin. 313.

§ 48.—Matters of defense.

One who is particeps criminis to a fraud is entitled to no consideration, and can not make the fraud available as a defense, except by showing that the relief rests on public policy.

Turley v. Couchman's Admr., 7 Ky. Opin. 88.

The defense of fraud by false representation made to a suit on promissory notes is not well pleaded where defendants who executed the notes do not allege that they were ignorant of the condition of the title to real estate for which the notes were given, and that they had been imposed on and induced to accept the deed by the fraudulent representations of the vendor.

Hoertz v. Marrett, 12 Ky. Opin. 501.

(C) EVIDENCE.**§ 50. Presumptions and burden of proof.**

Where there are badges of fraud

established by the plaintiff, it devolves upon the defendant to rebut these by establishing a bona fide sale upon a valuable consideration actually paid.

McIntire v. James & Martin, 1 Ky. Opin. 630.

Fraud or forgery can not be presumed or assumed without proof, but the existence of one or both may be established by competent evidence, as other facts are established.

Lindenberger v. Hurlburt, 2 Ky. Opin. 175.

Courts of equity have prudently established the preventive doctrine of constructive fraud, whereby contracts by trustees for acquiring the property of their confiding and comparatively uninformed beneficiaries, are prima facie presumed fraudulent, and will be so adjudged without proof on either side, thus imposing on a trustee buying his beneficiaries property the onus of satisfactory proof of the reciprocity and integrity of the contract.

Carney v. Lindsey, 2 Ky. Opin. 188.

The burden of proof to establish fraud rests upon the party charging it.

Opal v. Eckert, 6 Ky. Opin. 452.

Before a person can recover real estate not included in a deed, because of a claim that it was not included on account of the fraud or mistake of the draftsman he must establish the truth of such charge by a fair preponderance of the evidence.

Leiber v. Haggerty, 8 Ky. Opin. 136.

Fraud is never presumed, but must be proved, and the burden is on one charging fraud to prove it.

Woodhead v. Broscke, 9 Ky. Opin. 153.

The burden of proof is on one charging fraud to prove his charge.

Givens v. Dixon, 10 Ky. Opin. 401.

Where, as a defense to a suit to recover purchase-money and to enforce a vendor's lien, it is set up by defendant that plaintiff made false representations as to title and quantity of

land, the burden is on him to prove his allegations; and where the evidence shows his entry and possession and acceptance of the deed, and he fails to prove the fraudulent representations, he will fail.

Rosen v. Holland, 12 Ky. Opin. 728.

§ 58. Weight and sufficiency.

The evidence was held to show that the purchaser of mules who knew that he was insolvent at the time of the purchase, did not buy them with the intention of not paying for them.

Estill v. Cobb, 6 Ky. Opin. 257.

For evidence held not sufficient to show that an absolute deed was executed as a mortgage, and to establish fraud in representations to induce the signing of notes, see opinion.

Davis v. Stark's Exr., 12 Ky. Opin. 703.

III. CRIMINAL RESPONSIBILITY.

§ 68. Offenses.

An indictment for cheating was held sufficient which charges that the defendants represented ginseng offered and sold as being good, where they had placed lead in it which could not be discovered by ordinary prudence.

Commonwealth v. Hall, 9 Ky. Opin. 116.

When a fraud is accomplished by a false oral statement and a false symbol or token of such a character that common prudence will not detect its falsity, the offender may be indicted and punished without the aid of a statute.

Commonwealth v. Hall, 9 Ky. Opin. 116.

FRAUDS, STATUTE OF.

III. PROMISES TO ANSWER FOR DEBT, DEFAULT, OR MISCARRIAGE OF ANOTHER.

§ 14. Nature of debt, default, or miscarriage.

§ 17. Promise to answer in general.

§ 18. Promise to debtor to discharge debt.

§ 19. Promise to indemnify.

V. AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR.

§ 44. Nature and subject-matter.

§ 45. Stipulations as to time.

§ 48. Possibility of performance.

§ 49.—In general.

§ 50.—Dependent on contingency.

VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

§ 56. Creation of estates or interests in general.

§ 57. Creation of leases.

§ 58.—In general.

§ 62. Assignment, grant, or surrender of existing estates, interests, or terms.

§ 63.—In general.

§ 71. Contracts for sale.

§ 74. Nature of contract in general.

§ 76.—Partnership contracts and lands.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

§ 98. Creation or conveyance of estate or interests in real property.

§ 99.—Nature and form of instrument.

§ 103. Nature and form of memorandum in general.

§ 110.—Description of lands.

§ 114. Signature of memorandum.

IX. OPERATION AND EFFECT OF STATUTE.

§ 129. Part performance in general.

X. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 145. Pleading contract or transaction within statute.

§ 147.—As ground of defense.

§ 151. Pleading statute as defense.

Parol gift of real estate, see Gifts, § 25.

Specific performance of contract within statute of frauds, see Specific Performance, § 39.

III. PROMISES TO ANSWER FOR DEBT, DEFAULT, OR MISCARRIAGE OF ANOTHER.

§ 14. Nature of debt, default, or miscarriage.

Where after M had become bound as surety of O, W knowing of the

situation of the parties signed a note to secure M as surety, W's undertaking was within the statute of frauds.

Malin v. Wathen, 7 Ky. Opin. 356.

An agreement by one to pay for the board and care of his imbecile brother is not a contract to answer for the debt or default of another.

Foster v. Murphy, 7 Ky. Opin. 454.

§ 17. Promise to answer in general.

Where appellant undertook to satisfy the debt he owed H by paying the amount to H's creditor, it was a promise founded on sufficient consideration, and need not be in writing to make it obligatory.

Morris v. Tyler's Exrs., 5 Ky. Opin. 453.

If defendant only agreed to stand good for payment, and the goods were bought by another on his own account, he is not liable on such an agreement unless the same is in writing.

Scott v. Davis, Starts & Co., 8 Ky. Opin. 25.

A written contract between A and S whereby S agreed to pay for goods contracted for by A, is not admissible in evidence in a suit by the seller to collect from both A and S.

Scott v. Davis, Starts & Co., 8 Ky. Opin. 25.

Where goods were contracted for by A, the fact that they were charged to S did not create any liability against S, and a subsequent promise by S, unless in writing or made before delivery was completed, would not bind him to pay for such goods; and where, in a contract between A and S the latter agreed to pay for such goods, but failed to do so, the seller could not recover from S.

Scott v. Davis, Starts & Co., 8 Ky. Opin. 25.

A parol promise to pay the debt of another, not reduced to writing, is not enforceable because of the statute of frauds, but a contract with a debtor founded upon a valuable consideration to pay the debt which he, the debtor, owes to the creditor is binding.

Orr v. Colley, 8 Ky. Opin. 791.

Where there is no allegation that the contract of sale of real estate has been reduced to writing, such contract is held to be verbal.

Hicks v. Todd, 9 Ky. Opin. 81.

A promise of the wife to pay the debt of her husband, not in writing, is not binding on her, because of the provisions of the statute of frauds.

Miller v. Payne, 13 Ky. Opin. 656.

§ 18. Promise to debtor to discharge debt.

Where a person is indebted on promissory notes, and while still indebted he enters into a contract with appellant whereby for a valuable consideration appellant undertook to pay appellee's debt, such contract is within the statute of frauds, and such appellee can not recover against appellant and at the same time hold the evidence of indebtedness of the debtor whose debt appellant agreed to pay.

Press Printing Co. v. Smith, 8 Ky. Opin. 224.

Where one person in consideration of the sale of another's interest in a certain business, promises to pay off a debt of such other person, and fails to do so, and hence the vendor of such business interest is forced to pay the same, he may recover the amount from his vendee, who agreed to pay such debt.

Orr v. Colley, 8 Ky. Opin. 791.

The statute of frauds applies only to promises made to the person to whom another is already or is to become responsible, and not to promises made to the debtor, on a sufficient consideration, and consequently a promise made to the debtor and not to the creditor is not a promise to answer for the debt of another within the meaning of the statute.

Davis, Moody & Co. v. Wiley, 11 Ky. Opin. 580.

§ 19. Promise to indemnify.

A transaction was held to be within the Statute of Frauds as an undertaking to answer for the debt of another, and unenforceable because not in writing.

Moore v. Cowans & McIlvain, 6 Ky. Opin. 431.

V. AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR.

§ 44. Nature and subject-matter.

A contract by a party to build a fence in consideration of permission by plaintiff to defendant to lay and use a switch on plaintiff's land, was held not to be a contract which was not to be performed within one year.

Poindexter, Admr., v. Garnett, 6 Ky. Opin. 107.

§ 45. Stipulations as to time.

A contract not to be performed within one year from the making thereof can not be enforced unless in writing.

McKay v. Blackwell, 9 Ky. Opin. 18.

§ 48. Possibility of performance.

§ 49.—In general.

A contract to be performed upon the happening of a future and contingent event, which may happen within a year, is not within the statute of frauds.

Curlin v. McCrocklin, 9 Ky. Opin. 314.

§ 50.—Dependent on contingency.

Where the real consideration of a deed is the agreement to support a person and her children, the agreement does not fall within the statute of frauds, being uncertain as to the time of performance and not such a one as was necessarily "not to be performed within one year from the making thereof."

Osborn v. Osborn, 12 Ky. Opin. 361.

VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

§ 56. Creation of estates or interests in general.

Where Q sold a tract of land and executed his title bond, agreeing to convey the legal title when the purchase money was paid, and H sold back to Q a part of the same land at a stipulated price per acre to be credited on H's purchase-money note, and Q took possession of the land resold to him and improved it, a resale and delivery of the possession was a sufficient consideration to up-

hold the agreement to give a credit therefor, and where the legal title is in the vendor, and a resale is made to him by the vendee, in parol, and possession delivered, and this is used as a defense to his suit for specific performance, it is not within the statute of frauds, and should be allowed.

Harrod's Admr. v. Quire's Admr., 1 Ky. Opin. 305.

A verbal contract for the sale of land is not legally obligatory upon either party, until some writing evidencing the sale, and sufficient to take the contract out of the operation of the statute of frauds is executed by the vendor and accepted by the vendee.

Thompson v. Roark, 2 Ky. Opin. 301.

§ 57. Creation of leases.

§ 58.—In general.

Where a defendant, by his answer, admits a verbal contract between him and the plaintiff to procure oil leases for speculation, and for a partnership account, and in a letter written to his agent, procuring the leases, states they were to be for the benefit of himself and plaintiff, the answer is sufficient to take the transaction out of the statute of frauds.

Borders v. Burk, 3 Ky. Opin. 244.

A letter signed by the tenant was held sufficient to take his promise to pay additional rent for five years out of the statute of frauds.

Davis v. Gault, Admr., 8 Ky. Opin. 28.

An oral contract for the lease of a farm, made in October, 1874, for one year beginning January 1, 1875, and therefore not to be carried into full effect within the period of one year from the making thereof, is within the statute of frauds and hence unenforceable.

Lloyd v. Dumphrey, 9 Ky. Opin. 35.

§ 62. Assignment, grant, or surrender of existing estates, interests, or terms.

§ 63.—In general.

A parol contract to rescind an executory contract for the sale of land

may sometimes be set up as a defense, but it can not be proved to enable a plaintiff to recover in ejectment.

Hannah v. Baker, 10 Ky. Opin. 124.

The effect of a bond for a deed can not be avoided by proof of a parol rescission, for such a contract is within the statute of frauds and can not be enforced.

Hannah v. Baker, 10 Ky. Opin. 124.

§ 71. Contracts for sale.

The Statute of Frauds is subject to be repealed at any time by the law-making power, and a parol contract for the sale of land be enforced like any other contract.

Pratt v. Cox, 5 Ky. Opin. 410.

Before a court of equity will enforce a parol contract for the sale of land the terms must clearly appear as to price and time of payment.

Anderson v. Emison, 3 Ky. Opin. 379.

The sale of land by judgment of court is not within the provisions of the statute of frauds and perjuries and therefore need not be in writing.

Cantrill v. Talbott, 3 Ky. Opin. 413.

While a parol vendor may avail himself of the statute of frauds to avoid a specific performance, the heirs of the husband of the vendee can not invoke the same to the exclusion of the rights of the vendee.

Jones v. Williams, 3 Ky. Opin. 278.

A parol sale of land must be supported by uncontradicted evidence of an absolute barter, to overcome the Statute of Frauds.

Zeysing v. Wolfe, 4 Ky. Opin. 119.

A written agreement to arbitrate a parol sale of land, is sufficient to take it out of the Statute of Frauds, and it is not material whether the finding of the arbitrators is enforceable or not.

Wilhoit v. Hancock, 4 Ky. Opin. 62.

Evidence of a parol agreement for the sale of land, or promise that the vendor should have the land back, by

refunding the purchase price, with interest, does not show such an agreement or contract as can be enforced under the statute.

Walton v. Mize, 4 Ky. Opin. 240.

The courts can not enforce a mere parol agreement for the conveyance of land, but such contract may be rescinded upon equitable terms.

Tripplett v. Tripplett, 5 Ky. Opin. 704.

A parol contract for the sale of land is not binding on either party.

Gudgell v. Moses, 5 Ky. Opin. 646.

The sale of land by parol is not void as between the parties, and where the vendee takes possession under his purchase and is claiming the land such possession is notice to others of his claim of ownership, and he should not be disturbed in his possession or ownership.

Secret's Trustee v. Wade, 12 Ky. Opin. 344.

A parol purchase of land and possession under it is notice to the creditors of the vendor, and they can not disturb the sale upon the ground that the contract was not in writing.

Wade v. Norman, 12 Ky. Opin. 508.

A contract for the sale of real estate is void when not in writing or when no written memorandum thereof is made, because within the statute of frauds, but where a party is not seeking to enforce it as a plaintiff but is only as a defendant sheltering under it, it is not void for use as a defense.

Hite v. Hise, 13 Ky. Opin. 115.

While a parol contract for the sale of land is not void, it can not be enforced at the suit of the vendor, for the statute to prevent frauds declares that no action shall be brought to charge any person upon any contract not in writing for the sale of real estate.

Newman v. Sanders, 13 Ky. Opin. 625.

A parol contract for the sale of land is not enforceable, but where the vendee pays a part or all of the purchase-money under such a contract he is

entitled to subject said land to his claim.

Hoskins v. Chapel, 13 Ky. Opin. 960.

§ 74. Nature of contract in general.

No action at law or suit in equity can be maintained to enforce a verbal contract for the sale of real estate, and hence the court can not decree specific performance of such a contract.

Bidwell v. Fackler, 8 Ky. Opin. 97.

Where a mill and mill site are not only sold, but three acres of ground surrounding it, "so long as the property was used as a mill," such mill and mill site is a part of the real estate, and no action can be maintained upon a parol contract for its sale.

Montgomery v. Gardner, 8 Ky. Opin. 110.

A contract for the sale of land, not in writing, is within the statute of frauds, and hence not binding.

Hays v. Grinstead, 9 Ky. Opin. 773.

§ 76.—Partnership contracts and lands.

Where two persons as partners engaged in the erection of a house, and one desiring to withdraw from the undertaking after partly finishing the house, having surrendered his rights in the property to his partner on certain conditions, with the understanding that the title to the property should be conveyed to his partner, the contract was within the statute of frauds and can not be enforced.

Harrington v. Stevens, 6 Ky. Opin. 164.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

§ 98. Creation or conveyance of estate or interests in real property.

The statute of frauds does not apply to resulting trusts and such trusts will be enforced although evidenced by parol agreement.

Mayo's Heirs v. Hager, 5 Ky. Opin. 619.

§ 99.—Nature and form of instrument.

Where the subject of a proposition,

though doubtless understood by the parties, is not shown by the letter introduced in evidence, and it is not stated in the petition that it was shown by the letter in which the defendant says that he accepts the proposition, there was no contract evidenced by writing.

Moffett v. Powell, 1 Ky. Opin. 167.

A letter written by the party to be charged is sufficient to take a contract out of the statute of frauds.

Evans v. Miller, 12 Ky. Opin. 405.

§ 103. Nature and form of memorandum in general.

Where the acceptance of Confederate paper was induced by the debtor's promise to see that it was good money, and he thereby undertook to pay his own debt, a written memorial of the contract is unnecessary.

Justice v. Justice, 3 Ky. Opin. 586.

The record of a suit concerning land held sufficient to take the transaction out of the statute of frauds.

Pollock v. Germantown & Bridgeville Tpk. Co., 6 Ky. Opin. 324.

§ 110.—Description of lands.

Where a memorandum relied on gives no description of the property alleged to have been leased, and the parties were not in possession of the property when the memorandum was made, and did not afterwards take possession of it, and the property could only be located by extrinsic evidence, it is not sufficient to take the transaction out of the statute of frauds.

Gamble's Exr. v. Humbert, 6 Ky. Opin. 724.

§ 114. Signature of memorandum.

The statute is peremptory and conclusive which requires a memorandum in writing to be signed at the close thereof by the party to be charged therewith, or by his authorized agent, to bind him upon the sale of real estate.

Welsh v. Frye, 10 Ky. Opin. 280.

IX. OPERATION AND EFFECT OF STATUTE.

§ 129. Part performance in general.

A parol contract to take a part of

land to be sold by a decree of court, is binding on the parties, where one of them has performed his part of the contract by buying in the land at the sale.

Duncan v. Williams, 6 Ky. Opin. 18.

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Allegations in a petition showing that the testator simply promised to pay the debt of another and paid part of it, are not sufficient to constitute a cause of action, the promise being verbal and within the statute of frauds and perjuries.

Mitchell's Admr. v. Ray & Co.'s Assignee, 11 Ky. Opin. 588.

§ 147.—As ground of defense.

A parol contract within the statute of frauds is not void, and it may generally be relied upon as a defense to a suit brought upon an executory contract in writing.

Polk v. White, 9 Ky. Opin. 185.

§ 151. Pleading statute as defense.

If defendant relies on the statute of frauds, such statute must be pleaded in order to constitute a defense.

Albro v. Satchwell, Guardian, 7 Ky. Opin. 348.

A statement in the answer that the defendant "pleads and relies on the statute of frauds and perjuries," etc., is sufficient to entitle him to the benefit of the statute.

Welsh v. Frye, 10 Ky. Opin. 280.

One may waive, by a pleading, his rights to plead and rely upon the statute of frauds as a defense; and where one by a pleading consents that real estate sold by and under a verbal contract may be conveyed upon satisfactory proof that the property was purchased and paid for, he waives the right to plead the statute of frauds as a defense.

Brown v. Board, 11 Ky. Opin. 453.

To take a case out of the statute of frauds it is necessary that the promise by a third person to answer for

the debt of another shall be made, not to the creditor, but to the debtor; and where a parol promise to pay the debt of another is relied upon for recovery it must be clearly stated who made the promise and to whom it was made; and the pleading failing to make such allegations, there is a failure to allege facts sufficient to constitute a cause of action or to fix the liability of the persons sued; since such defects can not be cured by the verdict of a jury.

Davis, Moody & Co. v. Wiley, 11 Ky. Opin. 585.

FRAUDULENT CONVEYANCES.

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I. TRANSFERS AND TRANSACTIONS INVALID.

(A) GROUNDS OF INVALIDITY IN GENERAL.

§ 1. Nature of fraud in transfers of property.

Where plaintiff proves that defendant caused the land to be conveyed to C to protect it from defendant's creditors, C has the right to hold it as against defendant and his heirs, and the heirs of defendant will not take any part of it by inheritance.

Baxter v. Fielder, 5 Ky. Opin. 214.

A sale of property made to defraud creditors is valid against the fraudulent vendor and his representatives, and also valid against all merely voluntary conveyances subsequently made by him.

Dunn v. Conn, 3 Ky. Opin. 195.

A conveyance of all ones real estate to an assignee for the benefit of all of ones creditors can not be set aside as made to defraud creditors, on account of the assignor having withheld money from the assignee and his creditors with which a part of his debts could have been paid; since he may have defrauded his creditors in withholding the money, but the deed can not be held fraudulent for that cause.

Buckner & Terrill v. Beatty, 9 Ky. Opin. 892.

§ 13. Badges of fraud.

§ 14.—In general.

The sale by a debtor of all his property subject to execution, just prior to being sued by a creditor, was held to be a sham device to defeat the grantor's creditors.

Mullins v. Joyce's Admr., 7 Ky. Opin. 583.

While a sale, if bona fide, of tobacco in August for future delivery, it not then being in such state as could be delivered, would not be invalid on account of such nondelivery; yet if left several months after it might reasonably have been turned over to the purchaser, it becomes a badge of fraud on creditors, especially where strengthened by a subsequent levy by the vendee and the waiving of advertisement of the sheriff by the vendor's representative, and the sale of the whole amount of the tobacco, worth some \$250, for the paltry sum of \$50, no one being present at the sale but the sheriff, defendant, and agent of the execution creditor.

McIntire v. James & Martin, 1 Ky. Opin. 630.

The possession of real estate does not raise a presumption of ownership against the recorded title, nor is it ever a badge of fraud against the legal title as to future debts.

Ott v. Ott's Admr., 2 Ky. Opin. 114.

Where the evidence shows that a grantor, a man of means, makes a deed to a person of no means and in no condition to buy real estate, and the conveyance is not acknowledged and the grantor holds possession and control of the land and proclaims to a witness that he will soon have the

property back, it indicates that such conveyance was made in fraud, and persons dealing with such a grantor had the right to assume that he was the owner of said property.

Dorch v. Corum, 11 Ky. Opin. 322.

§ 15.—Particular facts and circumstances.

Where it is shown that a debtor, just prior to being sued by a creditor, conveyed all his property which was subject to execution, but retained possession and control of the premises, it makes out a prima facie case of fraudulent combination.

Mullins v. Joyce's Admr., 7 Ky. Opin. 583.

A conveyance made and the deed lodged in the clerk's office for registration, while the grantor is solvent, and before the creation of the liability of a surety for the grantor, is not fraudulent.

Macria v. Linder, 1 Ky. Opin. 405.

§ 16.—Conclusiveness and effect.

A vendor may act with a fraudulent intent and the vendee be entirely innocent of any fraudulent purpose, but when the vendor is insolvent and his condition well known by the vendee who accepts a conveyance of practically all of the vendor's real estate, the deed reciting that the consideration was paid in a sum more than double the indebtedness owing to the vendee, and the vendee does not place his deed on record for many months, nor until the vendor makes an assignment and agrees with the vendee to hold the title as a mortgage and trust for the vendor, fraud on the part of both the vendor and vendee is shown and the chancellor's judgment so deciding will not be interfered with.

Bailey v. Cheatham, 11 Ky. Opin. 761.

§ 17. Transactions valid in inception.

A debtor may lawfully sell his property, and a purchaser may buy it before any levy is made on it or has attached to it, and if the sale is in good faith for a valuable consideration, it will be upheld even though the purchaser and seller knew there were creditors seeking to collect their claims.

Lewis v. Richards, 8 Ky. Opin. 209.

(B) NATURE AND FORM OF TRANSFER.

§ 23. Elements or evidence of fraud in general.

A person having a claim against an estate can not release it or give it away, so as to defeat the right of his creditors.

Nelson v. Rose, 8 Ky. Opin. 371.

A conveyance of four hundred forty acres of land and all the personal property belonging to a widow in poor health, over sixty years of age, to her nephew, in consideration that he would care for her, will be set aside by the chancellor where it is shown to have been procured by unfair means, and where it is also shown that the nephew is furnishing the grantor with very poor and inadequate support.

Davis v. Chaney, 12 Ky. Opin. 506.

§ 24. Transactions subject to attack by creditors.

Where an officer of a corporation, to benefit himself, procured a mortgage to be executed to defraud the creditors of the corporation, it will not be permitted to be used for such a purpose, and the burden is on the holder of such a mortgage, so attacked, to prove the consideration.

Sulzer & Bro. v. Kentucky Furniture Co., 9 Ky. Opin. 72.

(C) PROPERTY AND RIGHTS TRANSFERRED.

§ 43. Property subject to claims of creditors in general.

Where the father buys real estate as agent of his son, and the son furnishes the money with which the purchase is made, and conveyance is made to the son, such conveyance can not be set aside at the suit of the father's creditor.

Barrow v. Elkins, 9 Ky. Opin. 286.

While a debtor may not defeat his creditors by fraudulently conveying his real estate, still where such a debtor buys land on time under a contract that it shall be conveyed when paid for, making said contract in his own name but for his two sons, and the proof shows that the two sons took possession and fully paid for the

land, and a deed was made to them on the order of their father, such conveyance will not be set aside at the suit of the father's creditors, for the father has nothing invested in such land and never owned it.

Johnson v. Atherton, 13 Ky. Opin. 376.

§ 44. Interest of debtor in property in general.

The sale of chattels, in the possession of a third party, who has the right for a limited time to hold it, is not fraudulent; nor is such sale of a growing crop fraudulent where the possession is retained by the vendor; and a sale of one's interest in a chattel owned with another, who has possession either in himself or a joint possession with the vendor, is not in fraud of creditors.

Stinnet v. Lowney, 8 Ky. Opin. 263.

§ 45. Real property.

Where an insolvent debtor had no property, except a house and lot, that could be reached by his creditors, and he conveyed that to a favored creditor, making no provisions for any one else, the transaction comes within the statute against fraudulent conveyances.

Bowman v. Tanklin & Son, 7 Ky. Opin. 459.

Where a son-in-law sold and conveyed land to his father-in-law for the price of about one-fourth its actual value, and the son-in-law was at the time insolvent, and the only consideration actually paid by the father-in-law was the discharge of some debts of the son-in-law, and the property was afterwards conveyed to the wife of the son-in-law for the consideration expressed in the deed to the father-in-law, the conveyance was fraudulent as to the son-in-law's creditors.

Williams v. Lewis, 7 Ky. Opin. 335.

A conveyance by a debtor with the best intentions to save his property for his creditors and to prevent suits, made to a trustee, while not made to defraud creditors, is void as made to delay his creditors, and such estate is subject to an execution of a cred-

itor who by his diligence secures an advantage over general creditors.

Turley v. Alphin & Craig, 12 Ky. Opin. 528.

§ 48. Rights in action.

The transfer and assignment by a debtor of his right to a chose in action to his son for a consideration of \$200, and claim for several thousand dollars, out of which the son recovered \$10,000, was held to be in fraud of the father's creditors.

Williams v. Lewis, 7 Ky. Opin. 335.

§ 51. Exempt property in general.

Where articles enumerated in a conveyance made by a debtor without consideration are such as can not be levied upon by creditors, such conveyance is not void as to creditors.

Shreve v. Bohison, 10 Ky. Opin. 35.

(D) INDEBTEDNESS, INSOLVENCY AND INTENT OF GRANTOR.

§ 54. Indebtedness element of fraud.

Where an assignment of an original survey to a large tract of land, on a copy of the original, was made, and afterwards the lands were patented to the assignor; and the assignment was without consideration, and at a time when the assignor was seeking to absolve himself of a large obligation on a bond of a defaulting sheriff; it is a fraudulent transfer of title, though the assignee acquired possession of the lands after the death of the assignor.

Vanada v. Kass, 2 Ky. Opin. 342.

§ 61. Insolvency element of fraud.

Where a contract of sale of real estate is made, and some time thereafter a conveyance is made under its terms, and a part of the purchase-money paid, one attacking such conveyance on the ground that it was made in contemplation of insolvency and to prefer the grantee must show that the grantor contemplated insolvency at the time he sold the real estate, and not when he made the conveyance.

Beverly v. Garvey & Co., 10 Ky. Opin. 533.

§ 63. Intent to defraud pre-existing creditors.**§ 64.—In general.**

Where the real estate is purchased by a debtor and conveyed to his wife, to the extent of the money paid for such property by the debtor it is a legal fraud upon his creditors, for which they have a remedy.

Suthy & Co. v. Murphy, 10 Ky. Opin. 366.

One largely in debt can not legally convey and sell his property for the purpose of defrauding his creditors, especially where the proof shows that no consideration was paid by his son who received the conveyance.

Hildreth v. Shipp, 11 Ky. Opin. 325.

A voluntary conveyance by a father to his son, without other consideration than love, will not be allowed or upheld as against the father's creditors.

Marsh v. Marsh's Assignee, 12 Ky. Opin. 139.

A debtor has no power to dispose of his estate in fraud of his creditors or to compromise with a part of his creditors and hold those who are unwilling to compromise by its terms; but there is no rule of law or equity which will prevent a debtor from disposing of his property in the payment of his debts or of compromising a question of title to property when done in good faith.

Zim's Admr. v. Lawrence's Exrs., 12 Ky. Opin. 436.

Where it is shown that a business man owning real estate and many thousands of dollars worth of notes, who has creditors, conveys nearly all of his estate to his son, who fails to explain where he acquired the cash to buy such property, the transfer of such estate will be set aside at the petition of the creditors.

City Nat. Bank of Paducah v. Gardner, 12 Ky. Opin. 458.

Actual fraud is a matter of intention, but like any other fact must be proved; and a conveyance, by a failing debtor, of his real estate to one who pay its fair value, the money being used to pay the grantor's creditors, or

a part of them, will not be set aside as a fraudulent conveyance, and the fact that the failing debtor preferred some of his creditors to others is not a fraud and will not vitiate the sale.

Garrott v. Lacey's Exr., 13 Ky. Opin. 973.

§ 66.—Pending actions or other proceedings.

Where a debtor sells and conveys his land before an attachment is served on the land, the purchaser having both the title and possession before the judgment was rendered, it is necessary, before subjecting the land, to make him a party and allege and show that the sale and conveyance to him were fraudulent.

Hand v. Fritsch, Buckhardt & Co., 13 Ky. Opin. 797.

§ 68. Intent to defraud subsequent creditors.**§ 69.—In general.**

A voluntary conveyance of real estate is not fraudulent as to subsequent creditors.

Fletcher v. Harl, 11 Ky. Opin. 297.

While a conveyance of real estate is not fraudulent as against persons who become creditors after the conveyance, it may be fraudulent as to creditors who become such before such deed is delivered to grantees.

Dorch v. Corum, 11 Ky. Opin. 322.

§ 72. Good faith of grantor in conveyance procured by fraud of grantee.

A sale of land by one, believing he held a good title to the land, is not fraudulent, where the land was afterwards disposed of by will, the will not being of record at the time of the sale.

Key v. Phelps, 2 Ky. Opin. 546.

(E) CONSIDERATION.**§ 73. Want or insufficiency element of fraud.**

A transfer of property, by a debtor to a stranger, for an ostensible consideration, not supported by competent evidence of fairness, and free from fraud, will not be upheld.

Cannon & Byers v. Morris, 3 Ky. Opin. 285.

The insolvency of a pretended purchaser up to the time of a sale to him, together with the act of the seller in disposing of all his property, and his disappearance to avoid his creditors, are sufficient to justify the court in finding that such transfer was without consideration and with intent on the part of both the seller and purchaser to defraud the seller's creditors.

Kelly v. McClung, 10 Ky. Opin. 795.

An absolute conveyance of land by the father to his children, without any consideration, will be deemed fraudulent as to the father's creditors.

Turner v. Sewell, 12 Ky. Opin. 504.

§ 74.—As to creditor.

A voluntary conveyance without consideration can not be avoided on that account alone, by creditors whose debt occurred subsequent to the execution of the deed.

White & Hill v. Fletcher, 2 Ky. Opin. 463.

Where property of an insolvent debtor is sold by him to a creditor for one-third of its value, the fact affords some evidence that the sale was pretended and was to defeat his creditors.

Leet v. Robertson, 8 Ky. Opin. 638.

A transfer by a debtor of his property without consideration is void as to his then existing liabilities.

Shreve v. Bohlson, 10 Ky. Opin. 35.

One must be just before he is generous, and a conveyance of the greater part of one's estate to his son and son-in-law at a time when the grantor is indebted can not be upheld as against the claims of creditors.

Adams' Assignee v. Branch, 10 Ky. Opin. 687.

One who conveys his real estate in consideration of love and affection, pending a suit against him by a creditor, which results in a judgment in favor of the creditor, commits a fraud against such creditor, and such a conveyance will be set aside at the suit of the creditor.

Gaitskill v. Stivers, 12 Ky. Opin. 565.

A conveyance by an insolvent sister to her brother of all her real estate without consideration is fraudulent and void as to creditors, and may at their suit be set aside.

Johnson v. Harrison, 13 Ky. Opin. 254.

A deed made without any consideration is fraudulent as against creditors; and where property thus conveyed is again conveyed and the grantee and grantor both enter into the fraud, it may still be reached by creditors of the first grantor.

Winslow v. Stewart, 13 Ky. Opin. 737.

§ 76. Nature and adequacy.

The court will not refuse to confirm a sale of real estate on account of a mere inadequacy of price when there is shown no fraud nor collusion by the parties to it.

Parker v. Wilcox, 11 Ky. Opin. 280.

§ 77. Sufficiency in general.

Where a man over seventy years of age owns real estate subject to the life estate of another man in good health and only thirty-seven years of age, and the whole title is worth not over \$3,000, a conveyance made in good faith to the owner of the life estate for \$700 will not be deemed fraudulent or be set aside, especially since at the time of the conveyance lawyers differed as to whether the grantor had any title to convey.

Banta's Exrs. v. Terry, 11 Ky. Opin. 44.

A debtor has a right to convey his property before liens attach to it, and if the conveyance is in good faith for value to another creditor, it will be upheld.

Tapp v. Trice, 13 Ky. Opin. 782.

§ 85. Pre-existing liability.

§ 86.—In general.

Where a conveyance is not shown to have been made for a pre-existing debt, but the consideration seems to have been for cash, it will not be set aside at the instance of creditors.

Boheim v. Huntziker, 10 Ky. Opin. 636.

§ 95. Transactions between husband and wife.

Where land is purchased by the hus-

band and conveyed to his wife, the greater portion of the purchase money being furnished by the wife, such conveyance could not be in fraud of the husband's creditors who became such long after the real estate was so purchased.

Jessie v. Farmer, 8 Ky. Opin. 291.

A voluntary and fraudulent conveyance, through another, by a husband to his wife, is void as against creditors of the husband, notwithstanding that the debt due such creditor was incurred after the date of such conveyance.

Taft & Son v. Barrett, 8 Ky. Opin. 395.

One may not make a gift of money to his wife and thereby defraud his creditors; but where his wife receives a farm by devise from her father who long before his death placed said daughter and her husband in possession, and the husband has the use of said land for a long term of years, rent free, and at the death of the testator there was not enough personal property to satisfy the debts, and the land devised to the daughter and her children is about to be sold to pay such debts, the husband, having had the use of the land for years, is under both a moral and legal obligation to pay the debt and relieve his wife's land, and when he does so his creditors, whose claims have accrued mostly since such payment, can not subject such land to sale to pay their claims.

Faulkner v. Jennings, 11 Ky. Opin. 399.

§ 96. Transactions between parent and child.

A deed in consideration of love and affection from the father to the son is fraudulent as to pre-existing debts.

March v. March's Assignee, 10 Ky. Opin. 601.

(F) CONFIDENTIAL RELATIONS OF PARTIES.

§ 102. Family relation in general.

Where a debtor invests money for the benefit of his wife and children, which ought to have been applied in the discharge of his debt, the creditor

has the right to follow the money, notwithstanding several sales and reinvestments.

Moore v. Litsey, 6 Ky. Opin. 566.

Where the husband, being insolvent, bought a house and lot, and failing to pay for same, the wife's father paid the purchase money and had the conveyance made to her, there was neither actual nor constructive fraud in the conveyance.

Rice v. Johnson, 2 Ky. Opin. 158.

Where D purchased land from C and received a title bond therefor, and shortly afterward assigned the bond to his father-in-law, the appellant; and D appears to have been insolvent at the time of the purchase and transfer of the bond, but continued to occupy the land, and made the payments due to C as part of the purchase price for some time after the transfer of the bond to appellant; the assignment of the bond was fictitious and fraudulent as to creditors.

Flynn v. Hart, 2 Ky. Opin. 289.

One who advances money with which to buy personal property for use of a brother in business, reserving a lien on same at the time of the purchase, will be entitled to hold the property to the exclusion of a creditor of his brother.

Smith v. McWilliams, 3 Ky. Opin. 246.

Where, at the time of the execution of the deed and assignment of the bond to a wife, her husband was not indebted to the appellants, her right to the property is superior to that of any of her husband's creditors.

Creely v. Kemper, 5 Ky. Opin. 648.

It is hard to establish fraud by the evidence of those participating in it, but where a mother-in-law is insolvent and lives in the same neighborhood with her son-in-law who owns but a small amount of personal property and has no money, but is on very friendly terms with his mother-in-law, who conveys to his wife and himself her real estate for a consideration of one thousand dollars, which is not clearly shown to have been paid—these circumstances show pretty conclusively that the conveyance was made to

defraud and hinder the grantor's creditors, and will be set aside at the suit of such creditors.

Caudill v. Goebel, 13 Ky. Opin. 213.

Where, under a contract whereby a person furnishes money to a merchant, to be used in purchasing commodities to be shipped to the person furnishing the money for sale, the merchant becomes indebted, he can not thereafter convey his real estate to members of his family on account of his love for them, and if he does, such conveyance will be set aside at the suit of the creditors.

McElrath, Albritton & Davis v. Spillman, 13 Ky. Opin. 696.

§ 103. Husband and wife.

Where an insolvent husband conveys land of his wife in fraud of his creditors, the creditors may subject the land to the payment of their debts, reserving to the wife a lien on the land to secure the proceeds of the wife's land which the husband had paid to the creditors.

Shanklin v. Shackler, 7 Ky. Opin. 577.

Where the wife's land was conveyed to another without consideration, who reconveyed it to the husband, the subsequent conveyance of the land by the husband and wife was by fraud and coercion, yet as the purchaser was a bona fide purchaser for a valuable consideration without notice to the heirs of the wife, they can not reclaim title.

Luke v. Gunnell, 1 Ky. Opin. 258.

Where the proof shows that the land was paid for by the husband, and the deed made to the wife while he was insolvent and after the note was executed, the conveyance to the wife was held procured to be made to her in fraud of the rights of the holder of the note.

Henry & Yeizer v. Hughey, 1 Ky. Opin. 285.

Where J and wife, W and wife and B were partners in the drug business, and on dissolution, finding that they were badly involved, agreed that in consideration of one of the partners verbally assuming to pay debts of \$1,000.00 and \$150.00 respectively to

appellees, J and wife executed and delivered to W a deed to a house and lot, the consideration being \$1,150.00, the amount of the two debts, the deed being made in the name of Mrs. W; and the testimony showed that Mrs. W really did not know what the consideration for the deed was, nor what the contract between her husband and J was, only so far as had been communicated to her by her husband; and her claim of the consideration being \$500.00 which she originally put in the drug business is not corroborated by the evidence; for all the uses of the creditors of B & Co., the husbands of the two feme covert partners must be held liable and the house and lot must be regarded as the property of the insolvent husband, and the wife holds as his trustee in derogation of the rights of creditors.

Willis v. Birdsell, 2 Ky. Opin. 319.

Where a transfer of bank stock, made before creation of debts to the husband, though final payment of all purchase money was not made until after such debts were created, the sale will not be set aside as fraudulent.

Marshall v. Roach, 4 Ky. Opin. 413.

Where a conveyance to a husband shows upon its face that it was intended merely to invest him with the title to the land conveyed while his wife and family were to continue to enjoy its profits, such conveyance can not be upheld as against his creditors.

Patterson v. Field, 5 Ky. Opin. 393.

Where real estate purchased is conveyed to the wife, and no objection or claim to title is made by the husband for thirteen years thereafter, it is too late for him to assert such a claim and to charge his wife with fraudulently procuring the conveyance to be made to her instead of to both of them, especially when he waits until after he and his wife are separated and she is locked up in a lunatic asylum and unable by reason of a crazed mind to make any defense.

Mann v. Louffer, 11 Ky. Opin. 742.

§ 104.—Transactions in general.

Where land is bought with the husband's money and the conveyance is

made to the wife it is fraudulent as to pre-existing debts, and the renewal of notes evidencing a debt does not create a debt so as to make it of date after such a conveyance is made.

Yates' Admr. v. Fisher, 11 Ky. Opin. 948.

A conveyance by a husband through another to his wife in satisfaction of a verbal antenuptial agreement made many years before, of property vastly in excess of any claims of the wife and at a time shortly before suit was brought against him for damages resulting in a judgment against him after the date of such conveyance, where no demand or claim had ever been made by the wife, will be held to have been made to defraud the creditor and will be set aside.

Floyd v. Martin, 12 Ky. Opin. 42.

A conveyance of land to the wife, purchased by the husband with his own means, is fraudulent as to pre-existing debts of the husband.

McBride v. McLaughlin, 12 Ky. Opin. 195.

Where a husband is insolvent, and his wife inherits money, and he has contracted for real estate for her, and she deposits the money in her husband's name, and he pays it out for the real estate as trustee, when the deed is made it is the property of the wife, and under such circumstances the husband can not be said to have reduced his wife's money to his possession so as to make it his own and render it subject to the demands of his creditors.

Delker v. Craig, 12 Ky. Opin. 401.

While a wife who has placed her means in possession of her husband may be entitled, as against him, to an equitable settlement, she can not obtain any relief as against his creditors or out of his estate when it affects their demands.

Turley v. Alpin & Craig, 12 Ky. Opin. 528.

Where a husband has not taken possession of his wife's money, but has borrowed money from her to invest in land, agreeing to repay her out of the sale of the land, and does so when

he makes the sale, such payment can not be said to have been a voluntary gift to her or a payment to her for the purpose of hindering, delaying or defrauding his creditors, especially where the whole transaction was in entire good faith.

Davis v. Davis' Admr., 12 Ky. Opin. 550.

§ 107. Parent and child.

A sale of property by an insolvent son to his father in discharge of a debt owing the father was held to be in fraud of other creditors of the son.

Chaney v. Lowe, 6 Ky. Opin. 457.

A conveyance from father to son, for a consideration of \$4,000, for a large tract of land, was held fraudulent as to creditors, where the evidence shows that the son, a young man, had but a small amount of visible means and an earning capacity largely inadequate to have produced a sum equal to the purchase price of the land, the son living with the father and the land not having gone out of the actual possession of the father.

Desazer v. Bonta, 1 Ky. Opin. 46.

Where a father, by deed of gift to his minor son, transfers all the property in consideration of the son becoming "emancipated," or deprived of any parental help or assistance or expectancy at the death of the parent; and the father was heavily involved, quite old and unable to support himself and family by manual labor; and shortly after this deed was executed and delivered, judgment creditors of the father levied on and sold all the land conveyed in the deed to the son, and it was bought in by one of the creditors, but was redeemed by the son just prior to the expiration of the redemption period, and an order secured from the purchaser to have the deed of purchase at the execution sale, made to the son; and it is shown that the son was only eighteen years old, and had no property of value, and it is not shown where he secured the funds to redeem the land, which required quite a sum of money; and other judgment creditors seek a resale of the same land; the deed of conveyance to the son was fraudulent and without consideration as to creditors,

and the land may be sold to satisfy their claims.

Surber v Floyd & Ford, 2 Ky. Opin. 309.

A sale of land by a father to his son, for a valuable consideration paid in full by the son will not be held to be fraudulent as to creditors of the father.

Teny v. Roberts, 3 Ky. Opin. 239.

A conveyance by a father to his son of a large amount of property without a visible change of possession, and at a time when the father was heavily involved, and in the absence of proof that the son had paid any of the purchase price, or was able to do so, was held to be fraudulent as to creditors of the father.

Trumbo v. Barber, 4 Ky. Opin. 393.

Property purchased by a son for the use of his parent, can not be subjected to the debts of the father.

Wathen v. Phillips, 4 Ky. Opin. 51.

If the sons permitted their father to make valuable improvements upon their real property, with funds which he should have applied to the payment of his debts, they could not complain that their father's creditors should be allowed to subject such improvements to the payment of their claims, and their assignee, with knowledge of the facts, is in no better position than the sons.

Rawlings v. Bosley's Admr., 5 Ky. Opin. 258.

One who is insolvent may not convey his property as a gift to a member of his family and thus defraud his creditors; such a conveyance will be set aside.

Wingate v. Garrison, 8 Ky. Opin. 189.

Where a father largely in debt conveys all of his estate to a son who lives with him, except such as is exempt from creditors, and it is apparent that the sole object is to prevent the collection of the claims of the father's creditors, the conveyance will be set aside; and a parol contract between the father and son by

which the father agrees to pay the son in his estate for the work of years and never executed until the creditors are about to take it, is of itself proof of the fraudulent intent.

Snapp v. Orr's Admr., 11 Ky. Opin. 785.

A contract between a father and son wherein the son comes into nearly the entire estate of the father will be closely scrutinized by the courts, and will be set aside in the interest of creditors, when not clearly shown to have been fair and honest.

City Nat. Bank of Paducah v. Gardner, 12 Ky. Opin. 458.

To establish an oral contract as to land between father and son, whereby the son secures his father's land when the father is in debt, so as to defeat his creditors, the evidence should be clear and convincing that the contract was for value and in good faith.

Hite v. Hise, 13 Ky. Opin. 115.

§ 108. Fiduciary and friendly relations.

It is not consistent with the principles of equity that appellant, after having permitted the legal title to remain in B for ten years without any effort to divest him of the title, should be permitted to come in and defeat the claims of B's creditors and other innocent parties who trusted him on the faith that he was the owner of the land.

Maloney v. Balee, 5 Ky. Opin. 454.

(H) PREFERENCES TO CREDITORS.

§ 114. Element or evidence of fraud.

Where an insolvent debtor executes a mortgage on his property to secure the payment of a debt some of which was previously due, however inconsiderable that debt may be, it brings the conveyance within the inhibitions of the Act of 1856.

Wilder & Co. v. Pepper & Co., 5 Ky. Opin. 265.

§ 115. Right of debtor to prefer creditor.

When diligence in securing debt not fraudulent as to other creditors.

Bank of Kentucky v. Bright, 4 Ky. Opin. 561.

Where one is in failing circumstances, he may sell his land and convey it to his creditor for a consideration not grossly inadequate, and thus pay such debt or allow a part of the consideration to be applied on such debt, and such a conveyance is not fraudulent.

Beard v. Runyan, 13 Ky. Opin. 171.

One may prefer one of his creditors, and in doing so does not necessarily commit fraud, but such a preference by virtue of the statute may be set aside if attacked within the given time.

Sweatman v. Spears, 13 Ky. Opin. 210.

§ 119. Confidential relations of parties.

Where F, L and M were partners in running a planing-mill and F and L left the state, at which time the partnership property was insufficient to pay the partnership debt, and M executed a mortgage to his father for the purpose of securing a debt owing him by the firm, which was executed in the firm name and for the purpose of securing only firm liabilities; as the proof shows that the partnership effects were not sufficient to pay the firm's debts, the mortgage of M was to secure his father in preference to other creditors.

Higgenson's Exr. v. Fitzhenry, 5 Ky. Opin. 84.

§ 122. Mortgages and other transfers as security.

As the debts of the appellee existed before the execution of the mortgage, the allegation in the answer that appellants were about to attach the property of K and that the mortgage was given to prevent them from taking such proceedings to secure their debt, was not sufficient and demurrer was properly sustained.

Kane v. Adams, 5 Ky. Opin. 557.

One who is insolvent may not legally prefer one creditor by a mortgage, to the detriment of other creditors; and if he attempts to do so, such mortgage will be declared of no effect.

Redford v. Tolls, Holton & Co., 9 Ky. Opin. 253.

§ 130. Effect of illegal preference.

In a suit to set aside a conveyance

made by an insolvent, a creditor, who, from the nature of the conveyance assisted in protecting himself and several other preferred creditors, by accepting the property and paying off the claims merely substitutes himself to the rights of such creditors to the extent of his payments, with no right of priority over others in the subsequent distribution of assets.

Wintersmith v. Goodin, 4 Ky. Opin. 67.

A note retaining a lien on land that had not been sold to the debtor by the creditor, is neither a sale, conveyance nor mortgage; and a conveyance of the property to such creditor is held to be in contemplation of insolvency and with the design to prefer, and hence the grantee will hold the property as trustee for all the grantors' creditors.

Huntley v. Bowles, 13 Ky. Opin. 947.

(I) RETENTION OF POSSESSION OR APPARENT TITLE BY GRANTOR.

§ 131. Element or evidence of fraud in general.

Where a debtor sells personal property and still retains the possession, it will be presumed that the sale is fraudulent as to attaching creditor.

Stephens v. Boswell, 5 Ky. Opin. 98.

Retention of the possession and use by the vendor, inconsistent with the title claimed by the vendee, was per se a legal fraud, which made the sale void as to the vendor's creditors.

Craig & Holley v. Haggard, 1 Ky. Opin. 14.

A sale of personal property, and leaving it in the possession of the vendor, even though the purchaser reside in another state, is void as to bona fide creditors of the vendor.

Jones v. Heronford, 3 Ky. Opin. 188.

Where, after the assignment of a lease by a husband to his wife, those living in the immediate vicinity, who had an opportunity of being informed

on the subject, saw no change in the manner of conducting the business, and the corn raised on the farm was sold by E as his own property, it was not claimed by the wife, nor did he aver his agency when he sold it, the corn sold by E was his own property.

Elkin v. Quinsberry, 4 Ky. Opin. 331.

In a suit to set aside a deed claimed to have been made as a mortgage to defraud the creditors of the grantor or mortgagor, where it is shown that the mortgagor after the mortgage is executed was always in complete control of it, and the personal property included in it is sold by him at pleasure, and the property is left with the mortgagor, who assumes as the agent of the mortgagee to manage, use and sell the mortgaged property at his discretion, it is strong evidence of fraud.

McFarland v. McFarland, 10 Ky. Opin. 889.

The rule that sales of personal property not accompanied by possession are void does not apply to mortgages and deeds of trust.

Eckstein, Norton & Co. v. Myer & Hay, 10 Ky. Opin. 942.

§ 132.—As to creditors.

Where the vendee in the sale of personal property resides with the vendor, in order for his purchase of a horse to be held valid against creditors of the vendor or innocent purchasers, there must be an open, visible and actual delivery and change of possession.

Hughes v. Busby, 9 Ky. Opin. 816.

An absolute sale of personal property, unless it be followed by the possession of the purchaser, is void as to creditors of the vendor.

Smith v. Turner, 9 Ky. Opin. 850.

Where the vendor of a horse and his vendee reside together, there must be an actual, visible change of possession, and where there is no such delivery the vendor's creditors may subject the property to their debts.

Smith v. Turner, 9 Ky. Opin. 850.

It is the fact of actual and visible change of possession and not knowledge on the part of those in the neigh-

borhood, that renders sales of personal property valid; and, where there is actual change of possession the sale is not per se fraudulent as to creditors.

Phillips v. Pipes, 9 Ky. Opin. 906.

Father must be just before he is generous, and he has no right to make gifts to his children at the expense of his creditors; and, hence, a conveyance made to a son for a nominal consideration, the father retaining control of the estate conveyed, will be set aside and made subject to the father's debts existing at the time of such conveyance.

Howell v. Smith, 10 Ky. Opin. 874.

§ 137. Nature of property transferred.

Where the law declares a purchase of personal property void because no delivery of property, such a purchaser can acquire by such purchase no equity as against the vendor's creditors.

Graves v. McKinney, 10 Ky. Opin. 222.

§ 147. Sufficiency of transfer of possession.

A sale of personal property left in the possession of the seller or his bailee after sale, is fraudulent as to creditors; but, where the bailee, at the instance of the seller, delivers the property to the purchaser, or agrees to hold the same for the vendee, it is an actual delivery and is not a sale fraudulent as against creditors.

Schmidt & Co. v. Larder, 8 Ky. Opin. 432.

(J) KNOWLEDGE AND INTENT OF GRANTEE.

§ 156. Knowledge or actual notice.

Mere knowledge by the vendee of the insolvency and indebtedness by the vendors to plaintiff, will not alone invalidate the transaction.

White v. Bayne, 2 Ky. Opin. 573.

Where there is no proof that the vendee had knowledge of or participated in a conveyance of land by defendant, it does not constitute a fraud upon any creditor, especially where no proof is offered as to the insolvency of the defendant at the time of the transfer.

Spearman v. Page, 2 Ky. Opin. 525.

§ 161. Participation in fraudulent intent.**§ 162.—In general.**

To successfully assail a deed as in fraud of creditors it is essential to show that the conveyance was in actual fraud of the grantor's then existing liabilities, or else intentionally so as to future creditors.

Ott v. Ott's Admr., 2 Ky. Opin. 114.

Where an insolvent debtor, after eleven o'clock at night, conveys his real estate to a grantee who knows he is in failing circumstances, and no cash is paid for such conveyance, but the grantor accepts three notes, the first of which does not mature for three years, such conveyance is in fraud of creditors and will be set aside.

Dodds v. Bank of Louisville, 8 Ky. Opin. 239.

§ 164. Effect of good faith of grantee.**§ 165.—In general.**

Even though suit be pending against a debtor, the debtor may sell and convey his real estate for full value; and even if such a sale does hinder the collection of the creditor's claim sued upon, it is not to be set aside as fraudulent where the grantee acts in entire good faith and pays full value for the conveyance to him.

Nichols v. Walker, 13 Ky. Opin. 702.

One who is indebted may convey his land, and if the purchaser buys in good faith and pays for it, even if he knows of the grantor's indebtedness, he has a right to make the purchase; and a conspiracy between him and his grantor to defraud creditors will not be presumed from proof of the fact that the grantee knew of grantor's indebtedness.

Ebelhar v. Poudin, 13 Ky. Opin. 749.

§ 169.—Voluntary conveyance.

Although a voluntary conveyance is void and fraudulent as to pre-existing creditors, such a conveyance is not fraudulent where the liability arose after the conveyance was made, and the fact that the deed was not recorded until after the liability was

created will not make such conveyance fraudulent.

Commonwealth v. Gibson, 13 Ky. Opin. 44.

II. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.**(A) ORIGINAL PARTIES.****§ 173. Mutual rights and liabilities of parties.****§ 174.—Title and rights to property.**

Although a mortgagor executes a mortgage to defraud creditors, if the mortgagee had a subsisting debt against him and was ignorant of his fraudulent purpose, such mortgagee is protected by § 1 of the statute relating to fraudulent conveyances.

Stone v. Hudson, 9 Ky. Opin. 857.

A sale of personal property, either made in good faith or to defraud creditors, places the title out of the vendor, and he can not in any event recover the property back from his vendee, or any one holding under or through him.

Atkinson v. Power's Trustees, 9 Ky. Opin. 882.

Those who, as grantees of real estate fraudulently conveyed to them by a grantor to defeat his creditors, participate in and knowingly aid the fraud have no standing, after many years, to oust the fraudulent grantor or his descendants from the possession of the real estate, which was never given over by said grantor after such deed was made.

Warden v. Field, 12 Ky. Opin. 577.

§ 177.—Payment and recovery of consideration.

A person who purchased land of an insolvent was held not to be guilty of such turpitude as to destroy his right to restitution of the money paid by him.

Caldwell v. Dohney, 7 Ky. Opin. 68.

§ 179. Rights and liabilities as to third persons in general.

Where there is no charge of fraud, the conveyance, as between strangers, will be sustained; but if fraud is charged the recitals in the deed can

not alone be relied upon to sustain its validity as against third persons.

McCallister, Admr., v. Seymones, 6 Ky. Opin. 583.

A contract fully executed, founded in a fraudulent purpose to cheat creditors is valid against those who, as volunteers, claim under one of the parties to the fraud.

Jones v. Thompson, 8 Ky. Opin. 703.

Where one disposes of all his estate to his father for the purpose of defrauding his wife out of her support, the father knowing of such purpose and taking over the property for such purpose, and the son abandons his wife, leaving her nothing, she is entitled to recover against both her husband and his father for the fraud thus worked on her.

Dragoo v. Dragoo, 12 Ky. Opin. 462.

§ 180. Rights and liabilities of grantees as creditors.

Where the grantee of a deed made to defraud creditors, mortgages the land to an innocent party, and in a foreclosure the land is sold, creditors entitled to the excess of purchase money after the payment of the mortgage may elect to take personal judgment against the owner of the land or have the land sold.

Howell v. Edwards, 8 Ky. Opin. 63.

While an innocent mortgagee of lands, mortgaged by a grantee of a deed made to defraud the grantor's creditors, is entitled to receive his money, the creditors of such grantor are entitled to receive the amount in excess of the mortgagee's claim.

Howell v. Edwards, 8 Ky. Opin. 63.

§ 185. Rights of grantees as bona fide purchasers.

The fact that a mortgage or deed reciting a consideration from mortgagor to mortgagee, or from vendor to vendee, at a greater sum than is really due, shows a concurrence of the mortgagee or vendee in the fraudulent intent of the mortgagor or vendor.

Bailey v. Cheatham, 11 Ky. Opin. 761.

The purchaser of real estate sold to defraud creditors may be proved to have had notice of the fraudulent intent of the vendor so as to affect his title, by it being shown that he had direct and positive knowledge of the fraud, or his knowledge of the fraudulent intent of his vendor may be inferred from the existence of certain facts and circumstances that would place an ordinarily prudent man on inquiry.

Ferguson v. May, 12 Ky. Opin. 151.

The fraud of the grantor in conveying his real estate to defeat his creditors does not affect the title of a purchaser for a valuable consideration, unless he had notice of the fraudulent intent of his immediate grantor or of fraud rendering void the title of the grantor; but where he accepts the conveyance with notice of the fraudulent intent of the grantor, the property so purchased may be subjected to the payment of the debts of the fraudulent vendor.

Ferguson v. May, 12 Ky. Opin. 151.

(D) BONA FIDE PURCHASERS FROM GRANTEE.

§ 196. Subsequent purchasers in general.

While a voluntary conveyance of real estate is fraudulent as against existing creditors, still where the grantee in such a deed conveys it to another for a valuable consideration, there is neither actual nor constructive fraud in the last conveyance.

Davis v. Woods, 13 Ky. Opin. 705.

§ 198. Good faith in general.

Where it is charged in a suit against one receiving a deed from a grantor who conveyed his land to defraud his creditors, that the grantee knew of his fraud, and the facts are that such grantee did know that his grantor was a fugitive from justice and helped him to get away, such grantee, to protect his title, must show his good faith purchase and the payment by him of a valuable and adequate consideration, without notice of

the circumstances surrounding such sale.

Tully v. Holmes, 9 Ky. Opin. 632.

The conveyance of real estate can not be set aside on proof alone of the fraudulent intention of the grantor, and it will not be set aside when the proof shows that the grantee acted in good faith without notice or knowledge of such fraud, or of facts which would put him on inquiry.

Thomas v. Whitaker's Admr., 13 Ky. Opin. 510.

§ 199. Notice.

One who is an innocent purchaser for value of real estate, and who has no notice or knowledge of the grantor's intention to prefer one creditor over another, secures a good title, and one that can not be questioned by creditors of the grantor.

Jackman v. Burton, 9 Ky. Opin. 575.

§ 201. Rights and liabilities.

§ 203.—As to creditors of original grantor.

An innocent mortgagee of land mortgaged by the grantee in a deed made to defraud the creditors of the grantor, is entitled to have his debt paid out of the land before the same can be made subject to the creditors' claims.

Howell v. Edwards, 8 Ky. Opin. 63.

III. REMEDIES OF CREDITORS AND PURCHASERS.

(A) PERSONS ENTITLED TO ASSERT INVALIDITY.

§ 206. Pre-existing creditors.

A creditor who holds the only claim against the vendor of real estate where it is shown that the debtor has other property sufficient to discharge such debt, can not successfully attack a conveyance made by his debtor.

Mercer v. Warfield's Guardian, 10 Ky. Opin. 719.

A man's property is liable for his debts, and a conveyance by him to secure the debt of his wife, incurred in the purchase of other real estate, will not be effective to prevent the husband's prior creditors from subjecting

such real estate to their claims, for while the conveyance made by him amounts to a mortgage it is second to the claims of prior creditors.

Ray v. Life Assn. of America, 13 Ky. Opin. 193.

§ 207. Subsequent creditors.

§ 208.—In general.

Where the husband receives money from his wife and buys real estate, taking conveyances in his own name, and sells the same, his wife joining in the deed, and buys other real estate, taking title the same way and becomes indebted on the strength of such property, the real estate deals being ratified by the wife joining in conveyances neither he nor his wife can assert that he holds the real estate for the wife, and a conveyance to the wife will be set aside at the instance of the husband's creditors.

Morris v. Preston Bros., 9 Ky. Opin. 907.

Where the donee of real estate is given a memorandum showing the gift, and enters into possession, even if the memorandum is not recorded, the creditors of the donor, becoming such after such possession and claim of ownership under the gift, must take notice and be on their guard.

Shipp v. Hibbler, 11 Ky. Opin. 691.

Where a father in the year 1862 put his daughter into possession of a farm and executed to her a memorandum that "This is to show that the farm I own in Harrison county, of two hundred and forty-seven and one-half acres, known as the William H. Wilson farm, I give to my daughter, Louisa Sims, to have and to hold until her death, and then to go to her children. * * * This 17th of April, 1862," and in 1875 conveyed the land to his said daughter and her husband for life, with fee to their children, it is held that creditors of the father, becoming such after 1862, can not subject such land to their claims.

Shipp v. Hibbler, 11 Ky. Opin. 691.

§ 211. Assignees.

The assignee of an insolvent debtor may maintain an action to set aside

a conveyance of real estate by his assignor made to defraud creditors.

Adams' Assignee v. Branch, 10 Ky. Opin. 687.

§ 219. General creditors.

Where there is no allegation of fraud on the part of a grantee or, of collusion with the grantor to cheat or defraud the creditors of the grantor and the consideration is adequate and actually paid, no question is raised as to whether the grantee was a creditor of the grantor, and the remedy of the creditors of the grantor, if they have any, is against the persons receiving the money from the grantor through the grantee.

Byram v. Grimes, 11 Ky. Opin. 778.

§ 221. Judgment creditors.

Judgment creditors, whose suits were filed after the debtor has made a fraudulent conveyance to defeat his creditors, are entitled to have such conveyance set aside, for actual fraud vitiates such transactions as to all creditors, whether prior or subsequent.

Haskell v. Wynne & Co., 9 Ky. Opin. 251.

§ 225. Estoppel and waiver.

Property conveyed or transferred by mutual arrangement of the parties, for the purpose of defrauding the creditors of the real owner, can not be recovered, by the aid of a court of equity, from either party by the other.

Schur v. Schur, 3 Ky. Opin. 44.

(B) REMEDIES ON GROUND OF NULLITY OF TRANSFER.

§ 226. Application of property to claims of creditors in general.

Where land is purchased and paid for by one, but title is taken in the name of the purchaser's son in order to place it beyond the reach of the purchaser's creditors, it may be subjected to creditor's debts.

Hibbard v. Potter's Admr., 7 Ky. Opin. 11.

(C) RIGHT OF ACTION TO SET ASIDE TRANSFER, AND DEFENSES.

§ 237. Nature and form of remedy.

Where personal property was included in a deed of conveyance, a

creditor will be required to exhaust same, before subjecting his preferred lien on the real property.

Johnson v. Nunn, 4 Ky. Opin. 347.

A subsisting debt, founded on a valuable consideration is held to be sufficient to authorize the cancellation of a deed from a husband to wife made after the creation of the debt.

Norwood v. Robinson, 2 Ky. Opin. 471.

A conveyance to an attorney procured by fraud from his client may be set aside.

Laws v. Wood, 9 Ky. Opin. 213.

The remedy at law must be exhausted before the chancellor will take jurisdiction to cancel even fraudulent conveyances, and equity will not give a remedy to reach property received by an heir from an ancestor, to satisfy the ancestor's estate. The law gives an adequate remedy in such a case.

Abell v. Abell, 11 Ky. Opin. 128.

Act 1838, 3 Stat. Laws, 116, authorizing suit in equity to set aside a fraudulent conveyance and subject the property to a creditor's claim, although the claim has not been reduced to judgment, and permitting attachment, is repealed by Civ. Code and Gen. Stat. relating to the same subject.

Vance v. Campbell, 11 Ky. Opin. 368.

A creditor may proceed by attachment to set aside a fraudulent conveyance and subject the property to the payment of his debt, when his claim has been reduced to judgment and execution has issued and returned "No property found," or he may sue in equity to set aside such a conveyance and subject the property to the payment of his judgment.

Anderson v. Avery, 13 Ky. Opin. 113.

§ 240. Grounds of action in general.

The court has no jurisdiction to decree that a conveyance be set aside because made to defraud creditors, where such creditors have taken judgment before justices of the peace, and fail to file copies of their judgments

in the clerk's office of the circuit court of the county where obtained, and have executions issued thereon and returned no property found.

Wilson v. Jones, 9 Ky. Opin. 553.

Where a conveyance of real estate is made by one to her half-sister after an attorney has caused the deed to be read and he has explained to the grantor just what interest she is conveying, and no undue influence is shown to procure the conveyance, the deed will not be cancelled, in the absence of proof showing that fraudulent and false representations were made to the grantor by the grantee.

Allison v. Moore, 11 Ky. Opin. 253.

While a creditor may be preferred if not within the Act of 1856, where the parties are in good faith, but a conveyance of real estate is made to enable a debtor to defraud his creditors and the grantor and grantee both participated in the fraud, and no actual consideration passes, such a conveyance will be set aside at the instance of a creditor.

Parker v. Wilcox, 11 Ky. Opin. 280.

Two things are necessary to set aside a conveyance of real estate on account of fraud: First, fraudulent intention of the vendor, and second, knowledge of that intention on the part of the vendee; and in neither case will it be lightly inferred that fraud was intended or that the vendee had knowledge of such intention.

Allen v. Gilliland, 12 Ky. Opin. 311.

§ 241. Conditions precedent.

In order to maintain an action in equity to set aside a fraudulent conveyance, it is required that the creditor shall have a judgment at law and a return of nulla bona upon his execution; and this is true whether the grantor or his estate is the defendant.

Pearce v. Brown & Bro., 9 Ky. Opin. 166.

Where a number of actions have been brought to set aside a conveyance made to defraud creditors, in one of which the plaintiff has caused exe-

cution to issue on his judgment, which has been returned nulla bona, and such actions have been consolidated into one, plaintiffs are entitled to judgments setting aside such conveyances, even though there have been no executions on their judgments against the debtor, where such debtor is admittedly insolvent.

Haskell v. Wynne & Co., 9 Ky. Opin. 251.

Where a conveyance was made to defraud creditors, it will be set aside at the suit of a judgment creditor, where execution has been returned nulla bona.

Haskell v. Wynne & Co., 9 Ky. Opin. 251.

A creditor can not proceed in equity to set aside a fraudulent conveyance made by his debtor until he has obtained judgment and there has been a return of nulla bona, or showing some reason why legal process would not be effectual.

Arnold's Guardian v. Doty, 9 Ky. Opin. 357.

A court of equity has jurisdiction to set aside a fraudulent conveyance and subject the property to payment of the grantor's debts either where the creditor proceeds by attachment under Civ. Code (1876), § 194, subsec. 7, or where he has first reduced his claim to judgment and there has been a return of no property found.

Vance v. Campbell, 11 Ky. Opin. 368.

A creditor has no standing in court to attack a conveyance alleged to be fraudulent, until after he has procured judgment, execution and a return on the execution of "No property found."

Disney v. Sawyers, 12 Ky. Opin. 75.

A suit to set aside a conveyance as fraudulent will fail where the plaintiff creditor has failed to obtain a judgment at law and execution thereon with return of "No property," unless there is a failure to object in the court below, by demurrer or otherwise to the court's jurisdiction.

Hill v. Cannon, 13 Ky. Opin. 294.

(D) JURISDICTION, LIMITATIONS, AND LACHES.

§ 248. Time to sue and limitations.

In order to invoke the aid of the statute of 1856, relating to fraudulent conveyances, suit must have been instituted within six months after the fraudulent preference was made.

Dudley v. Wilson's Admr., 6 Ky. Opin. 34.

(E) PARTIES AND PROCESS.

§ 250. Plaintiffs.

§ 251.—In general.

Where the owner of land, being surety on certain sheriff's bonds and believing he is about to be made a bankrupt, conveys his land to certain members of his family, such conveyance is binding upon him, but not on such creditors, and children receiving nothing in such conveyance can not have the deed set aside because made to defeat creditors.

Tinsley v. Tinsley, 13 Ky. Opin. 660.

§ 254. Defendants.

In an action to set aside a conveyance as fraudulent, the vendee can not be brought before the court for the purpose of passing the legal title.

National Bank of Lebanon v. Campbell & Irvin, 4 Ky. Opin. 522.

Where a deed is attacked as fraudulent, and is sought to be made an assignment for the benefit of creditors, and the vendor was not made a party, but the vendee only; on a claim that as the legal grantor was not before the court, there was no such action for subjecting the property as contemplated by the statute, and the deed vested nothing in the vendee.

National Bank of Lebanon v. Campbell & Irvin, 4 Ky. Opin. 522.

Where a petition charges a fraudulent transfer of lands to A., A. must be made a party to the suit.

Brago v. Smith, 4 Ky. Opin. 371.

In an action to subject property fraudulently conveyed to the debts of the vendor, he, as well as the vendee, must be made parties by appropriate

pleading, and summons must issue against all of them before a court of equity will take jurisdiction.

Talbott v. Phillips & Scally, 5 Ky. Opin. 401.

Where the grantee, in a deed made to defraud creditors, has conveyed the land, neither he nor his grantor are necessary parties to a creditor's action to recover the excess over the sum due an innocent mortgagee of such grantee.

Howell v. Edwards, 8 Ky. Opin. 63.

In an action to set aside a fraudulent conveyance, after the death of the grantor, it is necessary to join as defendants the heirs and personal representatives, or if such representatives are not joined it must be alleged there are none.

Pearce v. Brown & Bro., 9 Ky. Opin. 166.

(F) PLEADING.

§ 258. Bill, complaint, or petition.

An allegation that it was the intention of the grantor to exclude other creditors, is substantially a charge that the design of the grantor was to prefer the grantee to the exclusion of other creditors.

McCormack v. Robards, 7 Ky. Opin. 13.

A mere allegation that "the deed was fraudulent and that the land ought to be subjected to plaintiff's claim," without stating in what the fraud consists or for what purpose the deed was so made, is totally insufficient as an allegation of a fraudulent conveyance.

Arnett v. Baird & Craycroft, 1 Ky. Opin. 335.

§ 259.—Form and requisites in general.

Where a suit is brought to set aside a conveyance of real estate alleged to have been made to defraud a creditor, and the person receiving such conveyance is sued as garnishee, as a regular defendant, the plaintiff must state a cause of action; and if the cause is that the garnishee defendant is indebted to plaintiff's debtor, the petition must set up the facts showing

such indebtedness—a mere conclusion of law is not sufficient.

Grief v. McCracken County, 9 Ky. Opin. 330.

A court of equity will not entertain jurisdiction to set aside a conveyance alleged to be fraudulent and subject the land to the satisfaction of a legal demand, unless there is an allegation of judgment at law, and an execution and a return of nulla bona or by attachment under some of the grounds stated in the code, but where the question of want of jurisdiction is not raised until the cause reaches the Court of Appeals, it is too late to do so.

Walker v. Smith, 13 Ky. Opin. 200. 365.

§ 263.—Fraudulent transaction.

The pleadings and the evidence were held to show that a conveyance was made to put the property beyond the reach of the vendor's creditors.

Poindexter v. Henry Grant & Bush, 6 Ky. Opin. 401.

§ 266. Plea or answer and subsequent pleadings.

Where a petition charged a sale of lands by a defendant, for the purpose of defrauding creditors, that they were insolvent, and the sale was not a bona fide one, and that the purchaser knew of the existence of the debt at the time, to which the defendants answered, denying that the sale was made to defraud creditors, or with fraudulent intent, but alleging that the sale was bona fide and for a valuable consideration; it is an available defense, though the answer did not controvert the allegations of insolvency, and knowledge of the purchaser as to same.

White v. Bayne, 2 Ky. Opin. 573.

(G) EVIDENCE.

§ 270. Presumptions and burden of proof.

§ 271.—In general.

Where the evidence does not show that a father, who was guardian of his daughter at the time he purchased wedding apparel for his daughter, was

insolvent, fraud will not be presumed by reason of such gift to his daughter. Stanhope v. Bradley, 6 Ky. Opin. 425.

Where a mortgage is attacked upon the ground of fraud by a creditor, the burden is on the parties to such mortgage to show what the consideration was.

Lieber v. Wilson, 8 Ky. Opin. 438.

When a deed is attacked by a stranger for fraud, the onus is upon the grantee claiming under it, to show that the transaction is what it purports to be.

Rosa v. Burkley, 3 Ky. Opin. 66.

When a conveyance of real estate is attacked as fraudulent, or for want of consideration, as between the grantee and creditor of grantor, the burden of proof is on the grantee to show a good and valid consideration.

Grief v. McCracken County, 10 Ky. Opin. 565.

The existence of fraud charged in making a conveyance of real estate is not to be lightly inferred, but must be proven.

Walker v. Smith, 13 Ky. Opin. 200.

§ 285. Admissibility.

The judgment, ordering a rescission of contract, in the absence of fraud and collusion, is bona fide evidence and should be admitted in a suit by an execution creditor to subject lands fraudulently obtained from the vendees in an exchange.

Cayse & Bowers v. Morton & Walker, 3 Ky. Opin. 322.

§ 290.—Nature and circumstances of transaction.

While fraud charged in the conveyance of land to hinder and defeat creditors must usually be gathered from circumstances, yet the finding of its existence must not result from mere suspicion, but from evidence sufficient to overcome the presumption of fair dealing.

Thomas v. Whitaker's Admr., 13 Ky. Opin. 510.

§ 294. Weight and sufficiency.

§ 295.—In general.

The evidence was held to show that about the time of the attachment of

defendant's property, he was about to dispose of his property with the intention to defraud his creditors, and delay them in the collection of their debts.

Daniel v. Ulman, 7 Ky. Opin. 430.

The evidence was held to show that a conveyance by the father to his daughter was fraudulent and against his creditors.

Yantis v. Duncan's Admr., 4 Ky. Opin. 544.

Where in a suit to set aside a conveyance as fraudulent, it appears that F. was greatly embarrassed and conveyed a house and lot to his brother-in-law N.; and payment was witnessed at F.'s request by two nephews, and no one else than relatives were present, and F.'s wife was N.'s sister, and N. was not present when the deed was prepared and executed, and it was lodged for record by the grantor, and he retained the possession of the premises and listed same for taxation, and in this proceeding he employed and paid counsel to defend; these facts warrant the conclusion that the whole transaction was nothing more than a family arrangement intended to secure to F. and his wife the continued enjoyment of property, and was a fraud upon creditors.

Lyne & Co. v. Franceway & Nesbit, 4 Ky. Opin. 270.

The evidence was held to show good faith in the purchase and payment of the property by a third party.

Brown v. Harper, 4 Ky. Opin. 565.

The facts were held to show that the relations and dealings between a father and his son did not constitute a combination between them to place the father's property beyond the reach of his creditors.

Edwards v. Dickerson, Rice & Bishop, 6 Ky. Opin. 127.

The evidence was held to show that a conveyance was made to prefer one creditor to the exclusion of other creditors, and that it was made in contemplation of insolvency.

McCormack v. Robards, 7 Ky. Opin. 13.

The evidence was held insufficient to show that a father purchased land, paid therefor and had the land conveyed to his son for the purpose of cheating and hindering the father's creditors in the collection of their debts.

Morgan v. Murphy, 7 Ky. Opin. 532.

For evidence held to be insufficient to set aside a conveyance claimed to have been made fraudulently, see opinion.

Mercer v. Warfield's Guardian, 10 Ky. Opin. 719.

(I) TRIAL.

§ 309. Instructions.

The court erred in refusing the following instruction to the jury: "If they believe from the evidence, that after the alleged sale from F. Haggard to his attorney, said Haggard retained control and use of the property, the sale as to the creditors and third persons was fraudulent and void."

Craig & Holley v. Haggard, 1 Ky. Opin. 14.

(J) JUDGMENT OR DECREE AND EXECUTION.

§ 311. Judgment or decree.

In an action to set aside a conveyance as fraudulent, if the petition shows that the mortgaged property is sufficient to pay both debts, the equity of redemption, only, will be adjudged to be sold to satisfy plaintiff's debt.

Durret v. Bouche, 5 Ky. Opin. 667.

(K) DISPOSITION OF PROPERTY OR PROCEEDS.

§ 318. Subjection to claims of creditors in general.

Although, as a general rule, a creditor who has property of an insolvent debtor in his possession will not be compelled to pay for it until his debt is satisfied, yet the creditor may, by his conduct, preclude himself from the benefit of such rule.

Mulligan v. Harris, 6 Ky. Opin. 428.

§ 321. Priorities of creditors.

In a suit by a creditor to subject the lands in the name of the wife, conveyed to her by her insolvent husband, it is held that the wife will have a prior lien thereon for moneys she paid for the land out of her individual means.

Wright's Admr. v. Gillum, 2 Ky. Opin. 488.

FRAUDULENT REPRESENTATIONS.

See Fraud, § 8.

FREIGHT CHARGES.

Petition in action to recover excessive charges, see Carriers, § 196.

FRIGHT.

Liability of railroad company for frightening animals, see Railroads, § 360.

FUNDS.

Care and custody of public funds, see Officers, § 111.

In hands of court commissioners, see Court Commissioners, § 3.

FUTURE ADVANCES.

Mortgage securing, see Chattel Mortgages, § 22.

GAMING.**I. GAMBLING CONTRACTS AND TRANSACTIONS.****(A) NATURE AND VALIDITY.**

§ 3. Constitutional and statutory provisions.

(B) RIGHTS AND REMEDIES OF PARTIES.

§ 22. Parties to bet or game.

§ 27. Stakeholders.

§ 31. Parties to speculative transactions.

§ 33.—Recovery of property or proceeds.

II. CRIMINAL RESPONSIBILITY.**(A) OFFENSE.**

§ 62. Nature of offense of gaming.

§ 69. Games, sports, and devices prohibited.

§ 70. Playing or betting.

§ 74. Keeping or exhibiting gaming table, device, or implements.

§ 75. Keeping gaming house or place for betting or gaming.

§ 79. Persons liable.

(B) PROSECUTION AND PUNISHMENT.

§ 82. Jurisdiction.

§ 84. Indictment or information.

§ 85.—Requisites and sufficiency in general.

§ 89.—Description of place or house.

§ 94.—Issues, proof, and variance.

§ 95. Evidence.

§ 99. Trial.

§ 102.—Instructions.

No accomplices in offense of gambling, see Criminal Law, § 67.

I. GAMBLING CONTRACTS AND TRANSACTIONS.**(A) NATURE AND VALIDITY.**

§ 3. Constitutional and statutory provisions.

Section 5, ch. 42, R. S., relating to betting or wagering, comprehends any betting or wagering, whether upon a "game, sport, pastime," or an election. *Laudeman v. Gallagher*, 7 Ky. Opin. 559.

(B) RIGHTS AND REMEDIES OF PARTIES.

§ 22. Parties to bet or game.

Section 3, ch. 42, R. S., enables persons suing under § 2 to have discovery, not only as to the amount of money lost at gambling, but as to the persons interested in the game at which the money was lost.

Waddell v. Comar, 7 Ky. Opin. 591.

§ 27. Stakeholders.

The stakeholder of money or any other thing staked on a bet or wager, shall, when notified, return the same to the person making the stake, and if he fails to do so, the amount or value of the stake may be recovered from him by the party aggrieved.

Blackston v. McGill, 9 Ky. Opin. 642.

§ 31. Parties to speculative transactions.

§ 33.—Recovery of property or proceeds.

While one who has lost his real estate as a result of a game of chance may assail a conveyance made by him of such property, the conveyance can not be set aside upon mere rumors of such gaming contract and should not be disturbed by the chancellor where it is shown that such grantor lived for many years after the sale and conveyance, and made no effort to set the same aside, and that after his death and after a half of a century had elapsed it is for the first time sought by the grantor's heirs to set it aside.

Duggins v. Burdett, 13 Ky. Opin. 454.

III. CRIMINAL RESPONSIBILITY.

(A) OFFENSES.

§ 32. Nature of offense of gaming.

Where one bets on the result of an election, and that one candidate for office will receive a greater number of votes than another, and the election is held, such action is an offense punishable by the laws of this commonwealth.

Stickrod v. Commonwealth, 9 Ky. Opin. 276.

§ 39. Games, sports, and devices prohibited.

The term "tables" is an apt designation of gaming itself, and when used with reference to gaming, does not necessarily mean a round or square table on which cards are generally played; but any kind of a machine or contrivance at which a game of chance or betting can be engaged in is a "table" in the parlance of those who use them most often.

Smith v. Commonwealth, 11 Ky. Opin. 223.

§ 70. Playing or betting.

It is not a penal offense to bet that a certain individual will not be elected to a certain office at a certain election, unless he be a candidate for that office, or is voted for to fill it, or is

intended or expected to be voted for, or is expected to be a candidate for it.

Lee v. Commonwealth, 1 Ky. Opin. 243.

§ 74. Keeping or exhibiting gaming table, device, or implements.

It is not required that money should be won or lost to make the offense of setting up or permitting to be set up a faro-bank, gaming table, machine or contrivance used in betting; but it is sufficient that money may be won or lost, and the fact that it has not yet been won or lost will not protect the owner or keeper from being punished for setting up the place.

Wilson v. Commonwealth, 10 Ky. Opin. 308.

A rectangular table with cushions on the side, with four pockets, one in each corner, and on which games are played with cues and balls, is a billiard table, within the meaning of the statute providing that a license for billiard tables is required to be obtained in counties and cities and towns, and an indictment fails to state a public offense which alleges only that the accused unlawfully kept and had a billiard table for public use, within the corporate limits of the city of Louisville.

Commonwealth v. Montedonico, 13 Ky. Opin. 347.

§ 75. Keeping gaming house or place for betting or gaming.

Where the landlord has no knowledge that gaming is going on in his tavern he is not criminally responsible.

Commonwealth v. Watson & Thompson, 1 Ky. Opin. 181.

A prosecution for committing gaming in defendant's house is subject to the limitation of five years by one section, and one year after commission of the offense by another section.

Harris v. Commonwealth, 1 Ky. Opin. 215.

One not betting on gambling games and not knowing that others bet on them can not be said to have suffered games to be played at which money was bet; and it is essential in

such a case to show that not only the owner or controller of the house knew that the games were played, but that he knew money or another thing of value was bet on them, and one can not be guilty of suffering a thing to be done unless he knows that it is being done.

Hottisinger v. Commonwealth, 10 Ky. Opin. 330.

§ 79. Persons liable.

The act of gaming by one person will not make others present liable, although those present may have advised it or played in the game, since there is in a legal sense no such thing as an accessory or an accomplice in the offense of gambling.

Commonwealth v. Jones, 10 Ky. Opin. 320.

The president and directors of a county fair violate the law by permitting a machine and contrivance used in betting and other games of chance to be set up, kept and exhibited on premises in their occupation and under their control.

Smith v. Commonwealth, 11 Ky. Opin. 223.

Pool selling is neither a wager nor a game, and the president and directors of a county fair can not be convicted of permitting a game of chance on the premises controlled by them by permitting pools to be sold on such grounds.

Smith v. Commonwealth, 11 Ky. Opin. 224.

(B) PROSECUTION AND PUNISHMENT.

§ 82. Jurisdiction.

That the offense of gaming was committed in the county where the prosecution was instituted is essential to a conviction.

Harris v. Commonwealth, 1 Ky. Opin. 215.

§ 84. Indictment or information.

An indictment against one for suffering gaming in his house is defective where it fails to allege that at the time of the gaming the house was in the occupation or under the con-

trol of the party charged with the offense.

Berry v. Commonwealth, 4 Ky. Opin. 639.

If an indictment informs the defendant definitely of the offense with which he is charged, and a conviction would have barred a subsequent prosecution for suffering gaming in his house, it is sufficient.

Aubrey v. Commonwealth, 5 Ky. Opin. 207.

§ 85.—Requisites and sufficiency in general.

An indictment is not good which charges that the defendant bet the sum of five dollars with Thomas Pritchett on the election for county court clerk of Henderson county, held on the first Monday in August, 1874, there being no averment that the bet or wager related to the election or defeat of any person voted for at said election.

Commonwealth v. Cross, 9 Ky. Opin. 109.

To constitute a good charge for suffering gaming it must be alleged by the state that the accused knew the game was being played, and that something was bet on it.

Hottisinger v. Commonwealth, 10 Ky. Opin. 330.

An indictment for making a bet is sufficient where it charges, in substance, that pending the election for president of the United States in the year 1880 the accused bought a horse, agreeing to pay \$300 for it in the event of James A. Garfield's election to the presidency of the United States at said election, Garfield being one of the candidates, and if he was not so elected then the accused was to pay nothing for the horse.

Commonwealth v. Hunter, 11 Ky. Opin. 11.

§ 89.—Description of place or house.

An indictment is sufficient which charges that a certain house in which unlawful gaming was permitted was in a named town, even though there was no allegation that the house was located in Boone county, as the court will take judicial notice that the town

named is a county seat and is located in Boone county.

Commonwealth v. Von Bogeon, 9 Ky. Opin. 142.

An indictment for permitting gambling, which describes the gaming house as that of John Shepherd, is sufficient to describe the place, and there is no variance in proof when it shows that the title of the property was in the name of Shepherd's wife.

Commonwealth v. Berry, 10 Ky. Opin. 320.

Under an indictment charging one for permitting gaming in a house in the joint occupancy and control of the accused and another, he can not be convicted for permitting gaming in a house under his individual control or occupancy.

Luckett v. Commonwealth, 11 Ky. Opin. 844.

§ 94.—Issues, proof, and variance.

Where the defendant and another are charged with unlawfully suffering and permitting gambling to be conducted on premises in their occupation and under their control, and the proof shows that the defendant alone occupied and had controlled the premises, there can be no conviction.

Boden v. Commonwealth, 9 Ky. Opin. 534.

Where one is indicted for permitting a faro-bank to be set up on premises in his occupation and in his control, he can not be convicted under such charge, where the evidence shows that he has rented the property in good faith to another, although he rented it for the express purpose of its being used for gaming purposes, but is guilty, if guilty at all, of the offense of leasing the room to be used for the purpose of setting up a faro-bank.

Luckett v. Commonwealth, 9 Ky. Opin. 819.

In a charge against the accused for betting with another that a named person would not be elected county judge at the August election of 1874, the state, to convict, must prove not only that the accused made a bet on the election of 1874, but that he made

the bet with the person named in the indictment, that the person named as running for judge would not be elected at the election of 1874.

Talbott v. Commonwealth, 9 Ky. Opin. 824.

§ 95. Evidence.

While the unlawful conduct of the defendant's agents in the control of his house may have been strong evidence of his own guilty knowledge, yet it did not constitute his guilt.

Commonwealth v. Wells, 5 Ky. Opin. 195.

§ 99. Trial.

§ 102.—Instructions.

An instruction, that in order to convict, the jury must believe that accused acted, not only as "lookout," but that as such he assisted in the game, was held not to be erroneous.

Richardson v. Commonwealth, 7 Ky. Opin. 714.

An instruction that "if the jury believe from the testimony, beyond a reasonable doubt, that the defendant agreed to give Carter a cow in the event of Morrow's election, and said Carter was to give defendant a cow in the event of Ingram's election and such election was held, they should find defendant guilty of betting on the election, unless the jury should believe the bet was withdrawn or annulled before the election" is erroneous.

Lee v. Commonwealth, 1 Ky. Opin. 243.

An instruction is erroneous which charges the jury in a cause wherein the accused is charged with keeping a billiard table in a city, that unless the game of billiards was played on the tables they must find the defendant not guilty. What games were played on the tables was not material.

Commonwealth v. Montedonico, 13 Ky. Opin. 347.

GARNISHMENT.

I. NATURE AND GROUNDS.

§ 10. Grounds of garnishment.

II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.

§ 15. Persons under disability.

III. PROCEEDINGS TO PROCURE.

§ 76. Jurisdiction of person of garnishee.

§ 86. Petition or affidavit.

§ 88.—Particular averments.

IV. WRIT OR SUMMONS AND NOTICE, SERVICE, AND RETURN.

§ 90. Writ of summons of garnishment.

§ 91.—Nature in general.

§ 98. Summons or notice to defendant.

V. LIEN OF GARNISHMENT AND LIABILITY OF GARNISHEE.

§ 107. Priorities between garnishments.

§ 108. Priorities between garnishments and other liens or claims.

§ 112. Delivery of property to defendant or others after garnishment.

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

§ 121. Duty of garnishee to make disclosure.

§ 138. Answer or disclosure of garnishee.

§ 139.—In general.

§ 143.—Requisites and sufficiency of disclosure.

§ 148.—Conclusiveness and effect in general.

§ 149. Oral examination of garnishee.

§ 166. Trial of issues between plaintiff and garnishee.

§ 170.—Mode and conduct in general.

§ 174. Judgment against garnishee.

§ 181.—On trial of issues.

§ 191. Costs and attorney's fees.

IX. OPERATION AND EFFECT OF GARNISHMENT, JUDGMENT, OR PAYMENT.

§ 227. Effect of garnishment as between plaintiff and defendant.

See Attachment.

Answer in garnishment proceedings, see Judgment, § 854.

I. NATURE AND GROUNDS.

§ 10. Grounds of garnishment.

Where it is sought to require a judgment defendant's creditor to apply

means on the claim of the owner of the judgment, it must be established that such person is indebted to the judgment debtor.

Payne's Exr. v. Garth, 13 Ky. Opin. 302.

II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.

§ 15. Persons under disability.

A married woman who is a member of a firm indebted to A, but who is not empowered to bind herself as provided by the statute, can not be required to answer as a garnishee at the suit of A's creditors, since not being bound to A she can not be required to answer to his creditors.

Brewer v. Mercke, 8 Ky. Opin. 322.

III. PROCEEDINGS TO PROCURE.

§ 76. Jurisdiction of person of garnishee.

The mere presence of an officer of a foreign corporation in this state, does not give plaintiff a right of action in garnishment for a debt due in Indiana from the corporation to plaintiff by serving the garnishment writ on such officer.

May & Dudley v. Ohio Falls Car Co., 4 Ky. Opin. 558.

§ 86. Petition or affidavit.

A garnishee plaintiff can not so amend his affidavit as to render effective a levy which he had no right to have made under the first order sued out, and accomplish an end not contemplated at the commencement of the proceeding.

Vick v. Keilly, 7 Ky. Opin. 100.

In an equitable action on a judgment and return thereon of nulla bona, against a garnishee, no affidavit or attachment is necessary.

Hancock's Admr. v. Sandifer, 2 Ky. Opin. 584.

A petition, upon which a garnishment is issued, is insufficient unless it so acquaints the garnishee with the facts as to give him an opportunity to defend, the same as if he had been sued by his creditor.

Burch v. Keene, 3 Ky. Opin. 452.

§ 88.—Particular averments.

To authorize a judgment against one served as a garnishee, it must be averred that the garnishee defendant is indebted to the attachment defendant, and it is not sufficient to aver that one verily believes that such garnishee is indebted to such defendant.

Buckley v. Wakefield, 8 Ky. Opin. 283.

IV. WRIT OR SUMMONS AND NOTICE, SERVICE AND RETURN.**§ 90. Writ or summons of garnishment.****§ 91.—Nature in general.**

A summons against a party as garnishee, even if he is in possession of the land belonging to the defendant, is not a levy on the land; and one can not be made liable as garnishee because he is in possession of defendant's land. A mere summons served on a garnishee creates no lien on defendant's land in the possession of such garnishee defendant.

Robson & Co. v. Shea, 12 Ky. Opin. 428.

§ 98. Summons or notice to defendant.

The service of a notice on a garnishee defendant when he is indebted to the defendant does not amount to attaching a specific fund, nor does it constitute a lien on the fund, but it merely prevents the garnishee from paying the fund to the defendant, and if the garnishee become insolvent, the plaintiff is only on an equal footing with other creditors.

Farmers' Bank of Kentucky v. Louisville, C. & L. R. Co., 8 Ky. Opin. 755.

V. LIEN OF GARNISHMENT AND LIABILITY OF GARNISHEE.**§ 107. Priorities between garnishments.**

Where in an action of attachment a garnishee notice is served on a third person, and he answers admitting his indebtedness to the defendant, a subsequent attachment plaintiff, by serving a garnishee notice on the garnishee in the former proceeding, will

not secure priority on account of the garnishee notice first served not being in proper form; and if the party garnisheed acts in good faith and appears to the notice by filing his answer, and there is no collusion, the garnishment will stand.

Paducah Lumber Co. v. Langstaffe, Orme & Co., 13 Ky. Opin. 154.

§ 108. Priorities between garnishments and other liens or claims.

Where L. & Co. had their execution returned no property found, and filed their petition in equity, and enjoined the payment to their debtor of money due by H. & Co., and the clerk made the return to the March special term of court, instead of the regular June term; and such process was returned executed by the sheriff, April 25, and subsequently the debtor was proceeded against as a nonresident; a lien was created by attachment, prior to other creditors whose liens were filed subsequent to the filing by L. & Co.

Hancock's Admr. v. Sandifer, 2 Ky. Opin. 584.

§ 112. Delivery of property to defendant or others after garnishment.

After the service of a garnishee notice on a person indebted to a defendant, such garnishee may legally pay to such defendant the amount of its indebtedness in excess of the sum demanded by plaintiff from the defendant.

Farmers' Bank of Kentucky v. Louisville, C. & L. R. Co., 8 Ky. Opin. 755.

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.**§ 121. Duty of garnishee to make disclosure.**

Where the pleadings show that appellant's indebtedness to appellee was for a tract of land for title to which he held the bond of the latter, and that by this bond appellee covenanted to make appellant a general warranty deed to the land, the appellant, who occupies the position of garnishee, should be allowed to avail himself of

every defense he could have made had suit been brought against him by appellee.

Sanders v. Lawson, 5 Ky. Opin. 726.

§ 138. Answer or disclosure of garnishee.

§ 139.—In general.

When one is served with a summons as a garnishee, while answering that he owes the defendant nothing, he can not be allowed to compromise with the defendant and pay him a less sum than he claims, and thereby defeat attaching creditors; since whatever sum he agrees to pay in such compromise should be held for the attaching creditors.

Merritt v. Rarrick, 9 Ky. Opin. 420.

§ 143.—Requisites and sufficiency of disclosure.

When one summoned as a garnishee fails to make a disclosure satisfactory to the plaintiff, the latter may, either by an amended petition in that action or by another action, seek a personal judgment against him and also obtain an attachment; and when he seeks such a recovery in an independent action the garnishee may not successfully demur because at the time the other action is pending between the same parties and for the same cause.

Wearen & Evans v. Matheney, 11 Ky. Opin. 600.

§ 148.—Conclusiveness and effect in general.

An answer of one served as a garnishee is conclusive as to the amount of his indebtedness to the defendant, if no exception is taken thereto.

Louisville City Nat. Bank v. Baxter & Fisher, 10 Ky. Opin. 334.

§ 149. Oral examination of garnishee.

A garnishee has the right to appear in person and be examined orally or answer in writing, and if he adopts the latter mode, he cannot be compelled to appear in person, after a transfer of the case to equity, to undergo an examination before the court, unless he is in contempt of court for failing to make a sufficient answer,

as his testimony should have been obtained by deposition.

Upshaw v. Carbelt, 4 Ky. Opin. 168.

§ 166. Trial of issues between plaintiff and garnishee.

Where one is served with notice as a garnishee defendant and admits that he is indebted to the principal defendant, but plaintiff believes that he has not disclosed the full amount of such indebtedness, an issue thereon may be formed as between the plaintiff and such garnishee defendant, and such matter may be fully litigated or such plaintiff may file an original petition as against him and have the matter fully determined.

Lee v. Watson, 10 Ky. Opin. 455.

§ 170.—Mode and conduct in general.

Garnishee may be examined on oath by the plaintiff with reference to his indebtedness to the defendant, and if not satisfied with the facts thus obtained, the plaintiff may sue the garnishee in the name of the debtor, alleging a cause of action that the defendant himself might allege if he were the party making the complaint.

Louisville City Nat. Bank v. Baxter & Fisher, 10 Ky. Opin. 334.

§ 174. Judgment against garnishee.

The judgment for a debt at one term does not preclude the court from rendering judgment against a garnishee, summoned at a subsequent term.

Ullman & Co. v. Cloyd, 5 Ky. Opin. 336.

Where the allegations upon which a judgment was rendered against the garnishee are to the effect that the garnishee has property, money, choses in action, and legal and equitable interest in property belonging to judgment defendant, in his hands, and under his control, more than sufficient to pay the debt sued for, if the garnishee had in his hands money sufficient to pay such debt, a judgment may be rendered against him, but he cannot be compelled to pay the judgment defendant's debt, and then convert property in his hands belonging to the judgment defendant into money

for the purpose of reimbursing himself.

Rosseau & Craddock v. Mitchell,
5 Ky. Opin. 567.

Where appellees took a rule against appellant to show cause why it had not made payment into court of the sum admitted to be due as garnishee, and appellant responded that it did not have the money, thereupon the court made an order placing the company in the hands of a receiver, which was a final order, as the appellant was only a garnishee, it was error to render a personal judgment against it or place its property in the hands of a receiver.

Shelbyville & Belleview T. P. Co.
v. Washburn, 5 Ky. Opin. 731.

Where the city is garnisheed in an action against one claiming to be a creditor of the city, and the city answers denying the indebtedness, it is error to permit the plaintiff to take judgment against the city in that action, since this can only be done after issue formed between the plaintiff and the city in an original action.

City of Newport v. Limerick, 10
Ky. Opin. 326.

No judgment can legally be rendered against the garnishees upon their failure to answer, and when it is made to appear that the debt alleged to be due by them to the parties sued belonged to some one else, it afforded an additional reason for not rendering the judgment.

Brevard v. Stevens, 11 Ky. Opin.
37.

A plaintiff is not entitled to a personal judgment against a garnishee, but there should have been a rule awarded against him to bring the money into court or to produce the property that it might be sold.

Cavanaugh v. Fried, 11 Ky. Opin.
238.

§ 181.—On trial of issues.

No legal judgment can be entered against a garnishee, where proper pleadings are not filed and the issue tried against him.

Merritt v. Rarrick, 9 Ky. Opin.
420.

Where one summoned as a garnishee answers that the defendant is claiming from him a large sum of money, but as a fact he owes him nothing, the plaintiff by appropriate pleadings may litigate the question of whether such garnishee is indebted to the defendant, but where he fails to do so he is not entitled to a judgment against such garnishee.

Merritt v. Rarrick, 9 Ky. Opin.
420.

§ 191. Costs and attorney's fees.

A garnishee who makes no resistance is not liable for costs, and a judgment for costs being against the fund in his hands, the costs are to be first deducted therefrom.

Currant v. Currant, 4 Ky. Opin.
349.

Unless garnishees resist the claim against them in an equitable action by attachment, no costs can be recovered against them, especially where the litigation is prolonged by the negligence of the attaching creditors.

Hancock's Admr. v. Sandifer, 2
Ky. Opin. 584.

No attorney's fee can be adjudged against garnishees, who, in order to protect their interest, petition the court to cause all creditors seeking attachments to interplead in any one action against them.

Hancock's Admr. v. Sandifer, 2
Ky. Opin. 584.

A defendant, proceeded against only as garnishee, and who does not resist, is entitled to have his attorney's fee adjudged against a plaintiff who made the attachment necessary.

Craycroft v. Greenley, 3 Ky. Opin.
644.

IX. OPERATION AND EFFECT OF GARNISHMENT, JUDGMENT, OR PAYMENT.

§ 227. Effect of garnishment as between plaintiff and defendant.

An appeal from a judgment in favor of the same creditor by a garnishee in another case, will not operate to suspend his duty to proceed against the other garnishee, and secure the amount due thereon, since such a col-

lection might have discharged the garnishment appealed from, by reason of the debt being thus paid.

Hagerty v. Hayes & Scales, 3 Ky. Opin. 249.

The failure of an execution debtor, to use due diligence in collecting his judgment against the garnishee of the debtor, thereby losing to the debtor the amount of credit he was entitled to, will exonerate him from liability on his debt to that extent.

Hagerty v. Hayes & Scales, 3 Ky. Opin. 249.

GAS.

§ 14. Charges.

§ 15. Injuries from escape or explosion of gas.

§ 20.—Actions.

§ 14. Charges.

Where meters furnished to measure gas used are not correct within that degree of accuracy practicable to attain, and defendant has charged and collected from plaintiff an amount beyond the gas used, plaintiff is entitled to recover.

Fuller v. Louisville Gas Co., 8 Ky. Opin. 469.

§ 15. Injuries from escape or explosion of gas.

§ 20.—Actions.

Before evidence of the quantity of gas used by one tenant in a given house should be allowed to go to the jury to show that another tenant of the same house used a less amount of gas, it should be made to appear that both tenants burned gas for an equal period of time in an equal number of burners, etc., and such evidence will ever be allowed to fix the test of the quantity of gas used when the test by meters is as nearly accurate as it is possible for human ingenuity to attain.

Fuller v. Louisville Gas. Co., 8 Ky. Opin. 469.

GIFTS.

I. INTER VIVOS.

§ 1. Nature of gift in general.

§ 4. Requisites in general.

§ 7. Property which may be subject of gift.

§ 8.—Real property and interest therein.

§ 17. Delivery in general.

§ 18.—Necessity.

§ 25. Parol gift of land.

§ 31. Gifts of negotiable instruments.

§ 35. Validity.

§ 38.—Fraud, duress, and undue influence.

§ 41. Revocation and rescission.

§ 42. Operation and effect.

§ 46. Evidence.

§ 49.—Weight and sufficiency.

II. CAUSA MORTIS.

§ 53. Requisites in general.

§ 57. Time of taking effect.

§ 67. Gift of donor's promissory note or check.

§ 79. Evidence.

§ 82.—Weight and sufficiency.

See Dedication.

By husband to wife, see Husband and Wife, § 116.

By married women, see Husband and Wife, § 72.

By wife to husband, see Husband and Wife, § 49 3-4.

Of corporate stock, see Corporations, § 111.

Of land by parol to religious society, see Adverse Possession, § 106.

Parol gifts of lands, see Descent and Distribution, § 93.

Secret gift by husband to wife, see Husband and Wife, § 149.

To wife prior to marriage, see Husband and Wife, § 116.

I. INTER VIVOS.

§ 1. Nature of gift in general.

An individual can make a gift by delivery, but his mere promise to make a gift cannot be enforced, although in writing, unless there is a consideration for the promise.

Rain v. Sturgeon's Admr., 5 Ky. Opin. 575.

As creditors have no right to prescribe the terms of a gift, a condition that property deeded to the debtor and his heirs, free from his debts, is

held to be both morally and legally right.

Stephens v. Bishop, 3 Ky. Opin. 351.

§ 4. Requisites in general.

The naming of a child for another, is not sufficient to uphold a promise to make a gift, where no relation existed.

Rain v. Sturgeon's Admr., 5 Ky. Opin. 575.

In a gift of personal property, the possession must accompany and follow the gift, and should be an actual, visible change of possession such as would be known in the neighborhood.

Page's Admr. v. Page, 1 Ky. Opin. 385.

§ 7. Property which may be subject to gift.

§ 8.—Real property and interests therein.

The memorandum, "I intend him to have the tract he lives on, which is to be surveyed and valued," establishes a parol gift of the land.

Ray v. Ray's Admr., 2 Ky. Opin. 131.

If a daughter enters into possession of real estate under an unconditional parol gift, and claims the land under such gift for many years, the fact that she may have anticipated that her father who made such gift would make her a deed will not invalidate her title, since the gift, the entry under it and the continued possession, claiming it as her own for fifteen years or more, will convert her claim into a perfect title.

Chamberlain v. McKinney, 13 Ky. Opin. 53.

§ 17. Delivery in general.

To constitute a valid gift, there must be an actual delivery of the thing so far as it is capable of delivery.

Olds v. Harlowe, 7 Ky. Opin. 302.

A deed of gift, duly recorded, is a binding contract of conveyance, in the absence of undue influence or improper constraint.

Thomas v. Naylor's Admr., 4 Ky. Opin. 324.

§ 18.—Necessity.

The declaration of a person that he intends to give to another personal property (a note), is not a gift, since a gift can not be implied where the alleged donor holds the possession of the note up to the time of his death, and the proof shows the note was against his brother and it was never his intention to require its payment.

Prather's Admr. v. Prather, 13 Ky. Opin. 500.

§ 25. Parol gift of land.

One who has entered upon real estate under a parol gift, which is afterwards repudiated by the donor, will not be required to account for rents.

Stephens v. Reavis, 11 Ky. Opin. 391.

An expressed intention to give land to one can not be enforced, and where such a donor changes her mind and conveys only half of the land, there is no legal power to increase such donation.

Lisle v. Lisle's Admr., 12 Ky. Opin. 71.

Where one gives a town lot to his son prior to the creation of a debt by the donor, and the son takes possession and improves it, and is in the occupancy of it at the time the donor includes it in a mortgage to his creditor, the son's equity is superior to that of the creditor.

Lemmince v. Benton, 12 Ky. Opin. 131.

A gift of town lots to an infant by her father by parol will not be enforced against a purchaser from the father after nearly forty years have elapsed since the gift was alleged to have been made, and where the evidence shows that the father had improved the lots by building houses upon them, and where he had sold the same several times and repurchased them before making the final sale.

Shepherd v. Stewart, 12 Ky. Opin. 364.

Where a landowner, not being in debt, makes a parol gift of land to his daughter, and the daughter and her husband take full possession thereof and hold it adversely to all

the world for more than twenty years, the daughter's title is good, and a sale of the land by the sheriff to satisfy a judgment against the donor on a claim which arose more than twenty years after the donee took possession of the land, will be void.

Wade v. Norman, 12 Ky. Opin. 508.

§ 31. Gifts of negotiable instruments.

Where a bachelor, tenderly cared for by his niece for many years, turns over to her notes not in excess of a settlement of the obligation he owes to her, and the evidence shows by disinterested witnesses that he intended to give her the notes and expressed his purpose for years prior to his death to give her all of his estate, and said to witnesses that he had given her the notes subject to his right to draw the interest during his lifetime, such evidence is sufficient to uphold the gift even in the face of a will, duly probated, undertaking to dispose of all his estate.

Stretlow v. Vonderhide's Exr., 11 Ky. Opin. 377.

§ 35. Validity.

§ 38.—Fraud, duress, and undue influence.

Where one gave his daughter a piano, at the time being largely in debt, such a gift will not prevent the father's sureties who have been compelled to pay his debt from subjecting the piano in the same way the creditors might do.

Leavell v. Leavell, 12 Ky. Opin. 45.

§ 41. Revocation and rescission.

A gift duly executed during the life of a donor can not be disregarded by the donor's personal representative.

Gist v. Gist, Admr., 6 Ky. Opin. 209.

§ 42. Operation and effect.

A gift by a father to his "son and his heirs," is held to enure to the use and benefit of them alone, and not subject to proceedings in bankruptcy to subject same to the debts of the son.

Stephens v. Bishop, 3 Ky. Opin. 351.

§ 46. Evidence.

§ 49.—Weight and sufficiency.

Where the payee of a note retains it until her death, and it then passed to her executrix, evidence that the testatrix said at one time that all she wanted was the interest during her life and after her death it (the note) was to be Mrs. Eastman's, is not sufficient to sustain a claim of Mrs. Eastman to ownership of the note.

Long, Exr., v. Harlan, 8 Ky. Opin. 238.

II. CAUSA MORTIS.

§ 53. Requisites in general.

According to the well settled doctrine on the subject, to constitute a gift causa mortis, there must be three attributes, viz.: First, the gift must be with the view of the donor's death; second, it must be conditioned to take effect only on donor's death by his existing disorder; third, there must be an actual delivery of the subject of the donation.

Briscoe v. Briscoe, 2 Ky. Opin. 380.

§ 57. Time of taking effect.

To convey title by a gift causa mortis, the language and acts of the giver must indicate more than his intention in the future to give—it must be a gift in the present.

McCame's Admr. v. McCame's Admr., 8 Ky. Opin. 554.

§ 67. Gift of donor's promissory note or check.

Not only negotiable notes and bills of exchange, payable to bearer, or indorsed in blank and bank notes, but promissory notes not made payable to "bearer" without an assignment from the payees' donor may be the subject of gift causa mortis, as the beneficial interest therein may pass by delivery.

Briscoe v. Briscoe, 2 Ky. Opin. 380.

The delivery of a note to a possible future heir of the donor, who was old and in feeble health, would not amount to a gift causa mortis, where the gift was accompanied by the statement that it was to take effect if he died, he being at the time very feeble, and

believing that he could not live very long and stating that if he did not die, and lived to need it the note could be returned to him, where the donor lived for several months afterward, and the pleadings show nothing to intimate that the donor died of the same illness existing at the time of the alleged donation.

Briscoe v. Briscoe, 2 Ky. Opin. 380.

§ 79. Evidence.

§ 82.—Weight and sufficiency.

A gift causa mortis is not made out by a statement by the giver two or three days prior to his death and at the time he delivered certain personal property to a friend, "that he wanted him to take charge of his effects," and said he wanted it for the boys, meaning his grandchildren.

McCame's Admr. v. McCame's Admr., 8 Ky. Opin. 554.

GRAND JURY.

§ 5. Qualification of jurors.

§ 7. Authority to select and summon jurors.

Competency of grand juror as witness, see *Perjury*, § 32.

§ 5. Qualifications of jurors.

A processioner of land is a civil officer and is therefore disqualified to sit on a grand jury.

Commonwealth v. Phipps, 5 Ky. Opin. 759.

§ 7. Authority to select and summon jurors.

A person proposing to become a guarantor for another is not bound to inquire as to the acceptance of his proposal; but the creditor who intends to hold him liable for the debt of another, must show that he had reasonable notice of such intention.

Humphrey v. Hobbs, 4 Ky. Opin. 140.

Where a petition alleges that plaintiff sold to Sheppard a barrel of whisky, 42 gallons, \$3.25 per gallon, upon the faith of the written guarantee of the defendant, H., that it would be paid; and that he caused H. within

due and reasonable time to be notified that his offer as a guarantor of payment had been accepted by the vendor, is sufficient to constitute a cause of action.

Humphrey v. Hobbs, 4 Ky. Opin. 140.

Where the court neglects to appoint jury commissioners to select grand and petit jurors the marshal of the city court of Louisville, under the direction of the court, may legally summon a grand jury.

Stickrod v. Commonwealth, 9 Ky. Opin. 276.

The deputy marshal has the same power under the order of the court to summon a grand jury that the marshal has.

Stickrod v. Commonwealth, 9 Ky. Opin. 276.

GUARANTY.

I. REQUISITES AND VALIDITY.

§ 1. Nature of obligation.

§ 3. Express and implied guaranties.

§ 7. Notice of acceptance.

§ 8. Written guaranties.

§ 9.—Form and contents.

§ 10.—Execution in general.

II. CONSTRUCTION AND OPERATION.

§ 27. General rules of construction.

§ 39. Notice to guarantor of transactions under guaranty.

§ 44. Default of principal.

§ 46. Notice of default to guarantor.

III. DISCHARGE OF GUARANTOR.

§ 53. Change in obligation or duty of principal.

IV. REMEDIES OF CREDITORS.

§ 83. Pleading.

§ 84.—Mode and form in general.

§ 85.—Declaration, complaint or petition.

V. RIGHTS AND REMEDIES OF GUARANTOR.

§ 98. As to principal.

§ 100.—Indemnity or reimbursement.

I. REQUISITES AND VALIDITY.

§ 1. Nature of obligation.

The legal effect of a contract of a guarantor on a note is that the grantor will pay the note, if the maker does not, and when the maker fails to pay at maturity the guarantor may be sued upon his undertaking.

Duncan v. Norton & Co., 9 Ky. Opin. 88.

§ 3. Express and implied guaranties.

Persons who sign their names on the back of a note that has never been held by them to induce a person to purchase the note, thereby become guarantors thereof; and, whether they are bound jointly or severally is a question of fact to be determined by a jury.

Snoddy v. Johnston, 8 Ky. Opin. 107.

§ 7. Notice of acceptance.

Where a written letter of guaranty is acted upon in November, 1870, and the guarantor is not notified of the acceptance of his guaranty until August, 1871, such a notice is not given within a reasonable time.

Webb v. Moseby, 8 Ky. Opin. 212.

Where a person by letter not addressed to any particular individual, guarantees the credit of another such guarantor has the right to be informed within a reasonable time, when any one should accept it, and not receiving such notice he is not bound.

Webb v. Moseby, 8 Ky. Opin. 212.

To hold the writer of an introductory letter liable as guarantor, it is necessary that he be notified that he would be held for any loss occasioned thereby.

Snodgrass v. Kirtly, 2 Ky. Opin. 563.

§ 8. Written guaranties.

§ 9.—Form and contents.

Where with knowledge that there had been dealings between A and B, and in anticipation of other expected dealings between them, C, by writing, covenanted with B to pay or cause to be paid to him any indebtedness that might be incurred by A to B, it is an undertaking on the part of C to pay

any debts which A might create with B, regardless of the amount, and C was not entitled to notice as in case of letters of credit.

Newton v. Kennedy, 7 Ky. Opin. 113.

§ 10.—Execution in general.

Where plaintiff sued defendant as a guarantor of a bill on the back of which plaintiff's name was indorsed without a contract of guaranty being written above it, and plaintiff sets out the bill as a part of the complaint, he can not complain of the refusal of the court, after the case is ready for trial, to permit him to write out a contract of guaranty over the defendant's signature.

Jones v. Turner, 6 Ky. Opin. 499.

II. CONSTRUCTION AND OPERATION.

§ 27. General rules of construction.

A contract of guaranty is to be construed liberally, but this does not mean that the words of the guaranty are to be given an unnatural meaning.

Emerson, Fisher & Co. v. Dye, 13 Ky. Opin. 247.

§ 39. Notice to guarantor of transactions under guaranty.

An instruction that a guarantor had notice "during the spring of 1868," is not sufficient to constitute notice to the guarantor that he would be liable on his guarantee, in that it was too indefinite.

Humphrey v. Hobbs, 4 Ky. Opin. 140.

An instruction "that the whisky was sold in March, 1868, * * * and that defendant had notice during the spring of that year," is erroneous, in that the time of notice to the guarantor was unreasonable and indefinite.

Humphrey v. Hobbs, 4 Ky. Opin. 140.

§ 44. Default of principal.

Until the guarantor has paid something on the debt guaranteed, or has met some liability which he undertook and which the debtor should meet, there is no breach of the undertaking.

and that the guarantor has no right to insist that the debtor shall hold him harmless by paying the debt, and in no other way, since the debtor may perform the covenant by satisfying the creditors in any way he chooses.

Wood v. Wadsworth, 7 Ky. Opin. 473.

§ 46. Notice of default to guarantor.

If the contract of guaranty is a continuing one, notice of the various transactions need not be given the guarantor, and when he undertakes that a third party shall pay, or that in case of a default he will pay, he is not entitled to notice of default nor is any demand of payment of the principal necessary.

Emerson, Fisher & Co. v. Dye, 13 Ky. Opin. 247.

III. DISCHARGE OF GUARANTOR.

§ 53. Change in obligation or duty of principal.

If a creditor does any act inconsistent with the rights of the guarantor the latter is thereby released; and a new contract can not be made between the debtor and creditor without his consent, without releasing him, but it is only new contracts not contemplated by the guaranty that will release the guarantor.

Emerson, Fisher & Co. v. Dye, 13 Ky. Opin. 247.

IV. REMEDIES OF CREDITORS.

§ 83. Pleading.

To constitute a cause of action on an introductory letter as a guaranty, it is necessary to allege in a petition that a letter of introduction saying that the party was a "clever gentleman," was written with a fraudulent intent, and that it was held as guaranty for the debt contracted thereunder.

Snodgrass v. Kirtly, 2 Ky. Opin. 563.

§ 84.—Mode and form in general.

In an action on a guaranty, the conclusions of the pleader as to the purpose for which the bills were indorsed, and the legal obligation incurred by the indorsers are of no avail.

Jones v. Turner, 6 Ky. Opin. 499.

In an action on a guaranty contract, it is essential that the guaranty be made the foundation of the action, and recovery must be based on such contract.

Jones v. Turner, 6 Ky. Opin. 499.

§ 85.—Declaration, complaint, or petition.

Where the petition fails to aver notice of acceptance of a guaranty, evidence can not supply the place of such averment.

VanMeter v. Pepper, 8 Ky. Opin. 862.

To make out a cause of action against a guarantor, it is necessary in the petition to aver, in addition to the facts by which he became bound for the default of the principal, facts showing such default.

VanMeter v. Pepper, 8 Ky. Opin. 827.

V. RIGHTS AND REMEDIES OF GUARANTOR.

§ 98. As to principal.

§ 100.—Indemnity or reimbursement.

A guarantor is not entitled to repayment by the principal for costs and attorney's fees paid by the guarantor in defending an action upon a claim which he was not bound to pay under his undertaking of guaranty.

Wood v. Wadsworth, 7 Ky. Opin. 473.

GUARDIAN AD LITEM.

See Infants, § 76.

Appointment of, see Infants, § 76.

GUARDIAN AND WARD.

I. GUARDIANSHIP IN GENERAL.

§ 4. Guardians by nature.

II. APPOINTMENT, QUALIFICATION, AND TENURE OF GUARDIAN.

§ 8. Jurisdiction of courts.

§ 10. Persons who may be appointed.

§ 15. Bond.

§ 25. Removal.

III. CUSTODY AND CARE OF WARD'S PERSON AND ESTATE.

§ 30. Support and education.

- § 35. Possession and use of property.
- § 36. Management of estate.
- § 37.—In general.
- § 40. Sale.
- § 42.—Real property.
- § 44. Leases.
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- § 53. Investments.
- § 54. Interest on funds of estate.
- § 56. Loans.
- § 62. Individual interest in transactions.
- § 64. Waste, conversion or embezzlement by guardian.
- § 65. Loss of property.
- § 68. Reimbursement and indemnity to guardian.
- § 70. Ratification of unauthorized.
- § 72. Successive guardianships.
- IV. SALES AND CONVEYANCES UNDER ORDER OF COURT.
- § 81. Jurisdiction.
- § 83. Parties.
- § 86. Petition or other application.
- § 89. Determination as to necessity for sale, mortgage or lease.
- § 92. Special bond for sale.
- § 94. Sale.
- § 97.—Manner and conduct.
- § 99.—Persons who may purchase.
- § 100.—Requisites and validity in general.
- § 102.—Report or return.
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- § 108. Rights and liabilities of purchasers.
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- § 111. Deed to purchaser.
- V. ACTIONS.
- § 117. Rights of action between guardian and ward.
- § 118. Rights of action by guardian or ward or both.
- § 119. Rights of action against guardian or ward or both.
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- § 125. Time to sue and limitations.
- § 126. Parties.
- § 130. Pleading.
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- VI. ACCOUNTING AND SETTLEMENT.

- § 137. Duty to account in general.
- § 140. Property subject to charge.
- § 141. Property to be included.
- § 142. Release from liability.
- § 146. Proceedings for accounting.
- § 147. Charges.
- § 148. Credits.
- § 149. Compensation.
- § 150.—In general.
- § 153. Form and requisites of account.
- § 160. Opening or vacating.
- § 162. Costs and expenses.
- § 164. Private accounting and settlement.

VII. FOREIGN AND ANCILLARY GUARDIANSHIP.

- § 170. Actions by foreign guardians.

VIII. LIABILITIES ON GUARDIANSHIP BONDS.

- § 173. Nature and extent in general.
- § 177. Discharge of sureties.
- § 182. Actions.

See Insane Persons, III.

Action against guardian on contract, see Limitations of Actions, § 21.

I. GUARDIANSHIP IN GENERAL.

§ 4. Guardians by nature.

Where an infant inherited money from her grandfather and having no statutory guardian, her father took charge of her property and bought a tract of land and paid the purchase price out of the money inherited by her, and the father afterward mortgaged the land, the mortgagees having notice that it had been paid for with the infant's money, and the mortgagees made an assignment and their assignee brought suit to foreclose the mortgage, making the infant and her father a party thereto, the father held the money as the natural guardian of his daughter, the infant daughter may take the land, or consider it as security for the money; and the father's possession of his daughter's property as natural guardian does not subject it to his creditors, nor make a sale effectual against the infant, and the infant can not consent to the disposition of the property, and in such case the trust results in favor of the infant and she is entitled to her money which is invested in the land.

Reeves v. Moore, 5 Ky. Opin. 395.

II. APPOINTMENT, QUALIFICATION AND TENURE OF GUARDIAN.

§ 8. Jurisdiction of courts.

The county court has exclusive jurisdiction in the matter of appointing guardians, and a record showing that the court was in session and a guardian appointed and qualified as such is sufficient even though there may have been no previous order directing or calling the special term at which such appointment is made.

Collins v. Slaughter, 10 Ky. Opin. 695.

§ 10. Persons who may be appointed.

A mother is entitled to the guardianship of her infant children, rather than a stranger who has become persona non grata to some of the wards, and where the mother and the wards held the property in common, and there was at least an implied understanding between the guardian appointed and the mother of the wards, that he would surrender the guardianship in her favor.

McGrath v. McGrath, 6 Ky. Opin. 534.

As the influence and power of the husband over the wife would likely superinduce violations of her fiducial duties, he should incur with her, when he does so, at least equivalent fiducial responsibilities, and as the use, by him, of the ward's money, without personal security, is a violation of the wife's fiducial duties, which attach fiducial responsibilities of the husband, and the wards are equitably entitled to all their rights as against him, and they are entitled to priority over the husband's general creditors, so far as he may have their funds in his hands.

Evans v. Prewitt, 2 Ky. Opin. 298.

While our statutes provide that upon the marriage of an executrix or administratrix, her fiducial powers shall cease, no such provision exists as to female guardians; and as funds belonging to her wards in her hands which may pass into her husband's hands as fiduciary, and not into his hands merely as borrower; the statutes attach the same legal rights to

the wards against him, as though he had been legally appointed guardian.

Evans v. Prewitt, 2 Ky. Opin. 298.

§ 15. Bond.

Counter security given by a wife to a surety on her husband's guardian's bond, does not inure to the benefit of all the sureties thereon.

Calhoun v. Johnson, 4 Ky. Opin. 162.

Dating a guardian's bond is not necessarily essential to its validity; but recitals in the order of appointment that a bond was given and of the name of the surety are necessary and material to such validity, and where there is a conflict in the bond and order as to the date of a bond the court will rely upon the order, and not the bond, to ascertain the date of the bond.

Stembridge v. Stembridge, 10 Ky. Opin. 593.

The fact that the order appointing a guardian recites that the bond was executed on a day different from that shown in the bond, and recites the appointment of a guardian of two infants, while the bond is as guardian of one only, will not render such a bond invalid, nor release said guardian and his bondsmen from liability thereon.

Stembridge v. Stembridge, 10 Ky. Opin. 593.

Where a guardian's bond is taken and acknowledged in open court, it amounts to such an approval as the law requires; and the fact that the order shows an appointment of and qualification by the guardian as guardian for three infants will not affect his obligation to each of said wards.

Collins v. Slaughter, 10 Ky. Opin. 695.

§ 25. Removal.

A guardian can not be removed without notice to him of the proceedings for that purpose.

Mays v. Mays, 10 Ky. Opin. 577.

III. CUSTODY AND CARE OF WARD'S PERSON AND ESTATE.

§ 30. Support and education.

A ward can not hold her guardian responsible for necessities furnished her, beyond her annual revenue which

he had a right to anticipate, in the belief that ultimately the aggregate outlay would not exceed the aggregate income.

Lewis v. Nall, 2 Ky. Opin. 559.

A guardian may not legally expend for his wards more than the income from their estate without first procuring from the court authority to do so.

Cotton v. Wolfe, 10 Ky. Opin. 423.

A guardian has no right to maintain and educate his ward at an expense beyond the income of his estate, unless in case of the ward's sickness or extreme infancy so that it can not be bound out as an apprentice, or no suitable person will take it, or in case it is best for the ward that the principal of his personal estate shall be applied for his board and tuition, and the court, upon settlement, shall deem such application to have been judicious; but neither the ward nor his real estate is liable for such expenditures.

Collins v. Slaughter, 10 Ky. Opin. 695.

The word "maintenance," as used by law writers, is used indifferently to mean clothing, food and shelter, or tuition, clothing food and shelter, depending upon the circumstances surrounding the parties and the connection in which it is used; and in such cases the meaning attached to the word and the intention of the parties becomes a question of fact, to be submitted to the consideration of the jury.

Park v. Anderson, 11 Ky. Opin. 49.

It is only in an action by the guardian against his ward that the proceeds of the infant's estate can be applied for his maintenance and education, and in such an action the infant must be served with process.

Sawyer v. Guscuth, 11 Ky. Opin. 498.

Where a ward is the sister of the guardian and lives with him, and he desires to charge her for her board, he may legally do so.

Morehead v. Hobbs, 13 Ky. Opin. 1047.

§ 35. Possession and use of property.

Where minors purchase at a judicial sale, personal property of the estate

of which they are heirs, and take possession of and use the same continually, their guardian should be credited against an estate under his control with the amount bid by the wards, or upon an adjustment of accounts said property should be turned into the hands of the guardian.

Vaughn v. Edwards, 2 Ky. Opin. 490.

§ 36. Management of estate.

§ 37.—In general.

A guardian is bound to protect the interests of his ward, and may not place himself voluntarily in a position where his own personal interests are in conflict with those of his ward.

Dent v. Benjamin, 8 Ky. Opin. 14.

A guardian is authorized to purchase lumber for his ward to be used in building a small tenement on his land, as such a building was necessary to enable the land to be rented out advantageously.

Hays' Guard. v. Thomas & Scwie-nar, 9 Ky. Opin. 35.

A guardian has no authority to invest her ward's money for merely speculative purposes, and when she does so, she and her surety become liable for all the consequences resulting from such investment.

Galbraith v. Miller, Lyon & Co., 9 Ky. Opin. 740.

When a guardian invests his ward's money in stocks and bonds without the advice of the chancellor, he acts at his peril, and if the money is lost, the guardian will be held liable for the loss.

Roscoe v. Ledford's Admr., 9 Ky. Opin. 846.

§ 40. Sale.

§ 42.—Real property.

Where a guardian enters into an unauthorized contract to sell the ward's land, and puts the purchaser into possession, the purchase price to be paid when the ward becomes of age and makes a deed, and the money is paid to the guardian before the ward arrives at age, such payment is made at the peril of the purchaser, and the ward is not bound to make a deed.

Ralls v. Crouch, 9 Ky. Opin. 900.

Where minor children hold the fee simple to real estate, subject to the life estate of their mother, under provisions of the will of the father of the mother, the guardian of the children, by the acquiescence of their mother, who is willing to join in a conveyance of the real estate, may legally sell the same and reinvest the proceeds if the court, after hearing the petition, believes it is to the best interest of the wards to do so; and the court's decree should provide that property in which the proceeds are reinvested should be held in the same way under the will as was the real estate sold.

Harris v. Anderson, 11 Ky. Opin. 230.

Where a guardian sold the real estate of his ward in 1850 at private sale, when such sale might be made at private sale if directed by the chancellor, the purchaser whose sale has been confirmed will not be disturbed in his ownership, either by the infant or those representing him, unless there has been some fraud practiced.

Irvine v. Walker, 11 Ky. Opin. 387.

Before an infant's real estate can be sold there must be filed in court a proper petition for its sale by the statutory guardian appointed in this state and not in some other state, and in the petition the guardian should allege his belief that the sale would be to the benefit of his said ward, and a sale on petition of a guardian in a foreign state is void.

Allen v. Stump, 11 Ky. Opin. 493.

A statutory guardian, desiring to sell his infant ward's real estate for his maintenance and education, must make the infant a party defendant and have him served with process; and the court has no authority to order a sale where this is not done.

Sawyer v. Guscuth, 11 Ky. Opin. 498.

§ 44. Lease.

Where wards live with their mother it is legal for the guardian to permit the mother to rent out a building owned by the wards and apply the rents to the maintenance of the wards, and where she so applies the rent the

wards can not hold the guardian liable on account thereof.

Boyd v. Adams, 8 Ky. Opin. 553.

§ 47. Contracts.

§ 48.—In general.

Although persons under contract with a guardian have made improvements on the land of the ward under the belief that the guardian had the authority to contract with them for such purpose, yet they can not, by erecting a building on the infant's land, create a lien thereon whereby the infant can be deprived of his title.

Walter & Stuck v. Johnston, Guardian, 7 Ky. Opin. 482.

Courts of equity will not permit a guardian to contract with his ward; nor will such agreements be enforced if made within a short time after the ward becomes of legal age, except where the utmost good faith has been shown, for the reason that the influence of the guardian over the ward is still presumed to exist.

Hobbler v. McDowell, 10 Ky. Opin. 456.

§ 53. Investments.

The investment of a ward's money in a foreign corporation, if made, is at the peril of the guardian, and he is properly chargeable with the amount.

Collins v. Slaughter, 10 Ky. Opin. 695.

Where a guardian invests his ward's money in the assets of a partnership of which he is an individual partner, the money, being in the nature of a trust fund, and where it can be traced into the real estate, the equitable claim of the ward, innocent purchasers not having intervened, is superior to that of the claims of partnership creditors.

Ellis v. Johnson, 12 Ky. Opin. 163.

§ 54. Interest on funds of estate.

A guardian should pay interest on his ward's money remaining in his hands after her marriage.

Broyles v. Stonestreet, 1 Ky. Opin. 367.

§ 56. Loans.

Where a guardian loaned money in April, 1859, on a note due the following December, but suit on the note

was not instituted until March, 1864, and then against the sureties only, the principal having become insolvent in 1862, and a return of no property found was made as to the surety, and all the parties lived in the same town, and all the facts were known to the guardian, he was held negligent in failing to institute proceedings for collection of the ward's money, and was liable for its loss.

Spaulding v. Cissell, 6 Ky. Opin. 626.

A guardian, in loaning out money of the ward and in collecting money due the estate, should exercise a high degree of diligence for the protection of the ward's estate.

Commonwealth v. Coleman, 6 Ky. Opin. 692.

§ 62. Individual interest in transactions.

It is the duty of a guardian to notify his ward of the manner in which he holds his land, and if he fails, within a reasonable time, to offer to refund the money advanced by his guardian, he will lose his right.

Thompson v. Cooper, 4 Ky. Opin. 336.

A guardian is not bound to advance his own means to protect the land of his infant wards, but as he did purchase it for their benefit, he held the legal title in trust for them.

Thompson v. Cooper, 4 Ky. Opin. 336.

A guardian, who procures the sale of the ward's land, by a duly appointed commissioner, and then contracts the same for a specific sum to another, and at the sale buys the property for a smaller amount, is held to be liable on his bond for the difference in price to his ward.

Altzman v. Hammond, 3 Ky. Opin. 222.

The purchase of property by a guardian, in which his wards claim an interest, is held to inure to the benefit of said wards, though the deeds be taken in the name of the guardian individually.

Winip v. Payne, 4 Ky. Opin. 163.

§ 64. Waste, conversion or embezzlement by guardian.

A release by a guardian, to a special receiver, of an implied warranty of title to notes, made to and in the name of the receiver, is not a release of his liability for moneys coming into his hands, and improvidently loaned, nor his fiducial acts.

Erwin's Exr. v. Bedford, 3 Ky. Opin. 50.

Where a guardian converts the money of his wards to his own use, such wards have no preference over other creditors in the collection of their claims out of the property of such guardian.

Shanklin v. Harshfield, 9 Ky. Opin. 469.

§ 65. Loss of property.

A guardian may be required to make good the loss sustained by his wards, by reason of his failure to protect their interests.

Vaughn v. Tinsley's Admr., 5 Ky. Opin. 705.

Where by the terms of a will, a legacy is to be paid when the legatee becomes 18 years of age, the guardian has no right to collect the amount until his ward reaches such age; and the fact that the executors in charge of the money are wasting it will give the guardian no right to attach or collect the same, and he is not liable for his failure to do so.

Hill v. Messer & Riggs, 11 Ky. Opin. 18.

The law does not require that a guardian shall be an insurer of the funds of his ward, but he is only held to use his best skill, prudence and care in the management of his ward's property.

Giles v. White's Exr., 10 Ky. Opin. 407.

Where, when a guardian takes charge of his ward's estate, a former guardian has loaned a part of the ward's money and taken a note with personal security, and the new guardian believing it to be safer, and in the exercise of his judgment, took a mortgage from the debtor on 320 acres of land to secure such debt, and released the old surety, it is held that

the guardian is not liable for loss of such money when he acted in entire good faith, and did what a prudent man would have done in taking such mortgage.

Giles v. White's Exr., 10 Ky. Opin. 407.

§ 68. Reimbursement and indemnity to guardian.

Where the expenses of maintenance of wards equal the rents, interest, etc., of their property, one is held to offset the other.

Graves v. Hickerson, 3 Ky. Opin. 112.

Where a guardian acts honestly in making investments for his ward, and out of his own means improves land bought for his ward, thus giving to the land its rental value, he should be allowed to take the rents thereof to repay himself; but if he has sold valuable timber off the land he must be charged with the value less his labor in preparing it for market.

Morehead v. Hobbs, 13 Ky. Opin. 1047.

§ 70. Ratification of unauthorized acts.

When the guardian has entered into an unauthorized contract, agreeing that the ward will convey certain real estate when he becomes of age and receives the money, such ward may ratify the contract upon becoming of age, and is entitled to receive the purchase money upon tendering a deed, but he is not bound to look to his guardian for the money; and unless the purchaser will pay the money to him, he is not entitled to a deed, and will be liable to the ward for rents of the land when he has had the possession thereof.

Ralls v. Crouch, 9 Ky. Opin. 900.

Where a note is executed by a minor under guardianship for money which he received, it is voidable at the option of the minor, but where he permits his guardian to pay such note and makes no move to disavow the note until more than a year after becoming of age, equity will not hold such guardian liable at the suit of such ward.

Evans v. Evans, 10 Ky. Opin. 451.

§ 72. Successive guardianships.

Where one is appointed as guardian, and the ward, on arriving at fourteen years of age, chooses another guardian, who is appointed by a court in another county, and such first guardian pays over to the latter one what was then in his hands belonging to the ward, the second appointment not being legal, he remains liable to his ward the same as he would have been if he had not paid the guardian selected by the ward and illegally appointed.

Mays v. Mays, 10 Ky. Opin. 577.

IV. SALES AND CONVEYANCES UNDER ORDER OF COURT.

§ 81. Jurisdiction.

Where a guardian petitions for an order to sell his infant ward's land, the court has jurisdiction, whether the infant was in court as plaintiff or defendant.

Taylor's Guardian v. Talliferro, 10 Ky. Opin. 574.

§ 83. Parties.

A proceeding for the sale of the ward's real estate, where such wards were not made parties, is ineffectual to divest them of title.

Ready v. Collins, 8 Ky. Opin. 149.

§ 86. Petition or other application.

In a petition to sell the wards' real estate by a guardian for the purpose of making other investments under Rev. Stat. 1860, ch. 86, the wards are not necessary parties, as such petition is to be brought by the guardian who appears for them, and where the statute is complied with the purchaser at such a sale can not be disturbed at the suit of the wards when they become of age because of the fact that the new investment made by their guardian proved disastrous.

Dillingham v. Spalding, 13 Ky. Opin. 728.

§ 89. Determination as to necessity for sale, mortgage or lease.

In proceedings by the statutory guardians of infants to sell their real estate, before a court shall have jurisdiction to sell, three commissioners must be appointed and must report under oath to the court of the net value

of the infants' real and personal estate, and the annual profits thereof, and whether the interest of the infants requires the sale to be made.

Hall v. Summers, 5 Ky. Opin. 28.

§ 92. Special bond for sale.

The failure of a guardian or committee of an infant, idiot or lunatic to give bond, will render the sale of its real estate void.

Bush v. Quissenberry, 8 Ky. Opin. 715.

The failure of a guardian of infants to execute a bond for all of such infants, and the failure of a commissioner to execute a bond or properly qualify, will not affect the title of the purchaser at such sale after its confirmation.

Higdon v. Lancaster, 13 Ky. Opin. 635.

§ 94. Sale.

The fiducial relations of a guardian will estop him from denying the interest of his wards in land, sold by order of court and bought in by him for a mere trifle.

Lewis v. Adams & Lindsay, 3 Ky. Opin. 307.

The entering into a covenant to the Commonwealth, by a guardian desiring the sale of property belonging to minors, with security stipulating for the benefit of the infant heirs, for a faithful performance of his duties as guardian, and that he would perform the orders of the court, is essentially and lawfully in every legal sense, a bond to such minor heirs and wards separately and collectively.

Calvert v. Pearce, 2 Ky. Opin. 335.

If the money to which the appellant was entitled was otherwise secured, the failure of the purchaser to execute bond does not affect the sale.

Edwards v. Carter, 5 Ky. Opin. 59.

§ 97.—Manner and conduct.

Mere irregularities in the proceedings to sell the ward's real estate, if not detrimental to the ward, will not affect the purchaser's title.

Bush v. Quissenberry, 8 Ky. Opin. 715.

§ 99.—Persons who may purchase.

Where a guardian buys in property

at a low price where it is his ward's interest to have the property sold at a high price, such a sale may be set aside.

Dent v. Benjamin, 8 Ky. Opin. 14.

A ward may treat his guardian's purchase of his land as having been made for his benefit, and insist that the guardian hold it, and that his heirs hold it in trust for him; and this is true whether the purchase was for a fair consideration or otherwise, since the guardian can not purchase from himself.

Jones v. Dugan, 9 Ky. Opin. 612.

§ 100.—Requisites and validity in general.

If a guardian buys in the ward's property at a low price when it is the ward's interest to have the property sold at a high price, the ward may either elect to treat such a purchase as having been made in trust for him, or may repudiate it.

Dent v. Benjamin, 8 Ky. Opin. 14.

Where land sold by a guardian brought its full appraised and actual value, even though the proceedings were not in strict conformity to the law, but were fairly conducted and the price received used for the maintenance and education of the infant, and the balance paid over to him when he arrived at the age of twenty-one years, he should not be permitted, by reason of the irregularities in the sale to deprive innocent purchasers of the land, without at least repaying the amount paid out by them for the land and received by him.

Trower v. Gahhart, 11 Ky. Opin. 508.

§ 102.—Report or return.

The purchase by a guardian of a portion of an estate of a decedent and execution of his note therefor to the father of his wards, will not relieve him of his duty to report the indebtedness to the proper court as the estate of the wards in his hands.

Vaughn v. Edwards, 2 Ky. Opin. 490.

The failure of the statutory guardian to file a report or to have one filed by a guardian ad litem can not avail a purchaser of the property sold un-

der a decree, where all the necessary parties are before the court.

Lucas v. Fidelity Trust & Safety Vault Co., 13 Ky. Opin. 935.

§ 103.—Confirmation.

The court can not, at the instance of a guardian, have a void sale by the guardian confirmed, in a suit to which the wards were not parties, upon the ground that it would be to the interest of the wards, where the purchaser at the judicial sale is resisting confirmation.

Watson v. Spradling, Exr., 6 Ky. Opin. 563.

Confirmation by the court of a sale of land by the guardian, prior to the death of the ward, precludes the ward's heirs from setting up claim to the land.

Lester v. Winfrey, 6 Ky. Opin. 121.

Where, in an original proceeding to sell a ward's real estate, no good title is conveyed because the ward was not made a party thereto, a supplemental proceeding pursuant to the statute of September 30, 1861 (Myer's Supp. 424) may result in a judgment of the court confirming such sale and conveyance.

Ready v. Collins, 8 Ky. Opin. 149.

§ 107.—Collateral attack.

Where it is shown by infants that no bond was executed for the sale of their land, or that they or their guardian had received no part of the purchase money, notwithstanding the order of the court recites that a bond was given, the proceeding to sell in so far as it affected the infants was void, and a conveyance under such sale should not be made.

Smith v. Watson, 8 Ky. Opin. 412.

§ 108. Rights and liabilities of purchasers.

One who purchases at guardian's sale of real estate and pays the purchase money, and the conveyance is approved by the court, is not held liable to pay the purchase money over in case the guardian fails to reinvest the purchase money to the advantage of his ward.

Dillingham v. Dillingham, 9 Ky. Opin. 74.

Where a ward's real estate is sold in pursuance of a judgment in a suit, where only a part of the owners were made parties, it is erroneous to commit the purchaser to jail for contempt of court in refusing to pay the whole of the purchase money.

Grant v. Graham, 9 Ky. Opin. 638.

§ 110. Liabilities on bonds for sale.

A surety on a guardian's bond can not escape liability by taking the ward's property to indemnify him against loss on account of his suretyship.

Westerfield v. Vanarsdall, 9 Ky. Opin. 80.

Where a guardian sells his ward's property, and the infant and those representing him are satisfied with the sale, and the purchaser has paid the purchase money and is in possession, a surety on the guardian's bond can not escape liability by pleading defects in the record under which the property was sold.

Farmsworth v. Lanam, 9 Ky. Opin. 770.

§ 111. Deed to purchaser.

The order of sale and the bond of the guardian should be considered together, and where the bond is given by the guardian for four named infants and the order of sale only names three of them, it will be held binding on all, and the title made by conveyance of a commissioner is good.

Higdon v. Lancaster, 13 Ky. Opin. 635.

V. ACTIONS.

§ 117. Rights of action between guardian and ward.

The wards have the right to sue the guardian alone, or with one or more of his sureties, and a judgment against one of such sureties can not be reversed because the other sureties were not made parties to the suit.

Brooks v. Morrow, 2 Ky. Opin. 202.

The matrimonial outfit of the ward is held to be "necessities," in a suit by a ward against her guardian for recovery of amounts advanced her beyond her annual income.

Lewis v. Nall, 2 Ky. Opin. 559.

A settlement with a guardian by his ward and her husband, based on the commissioner's report, waives her right of action against the guardian for payments to her upon her order, though they exceed her annual income.
Lewis v. Nall, 2 Ky. Opin. 559.

§ 118. Rights of action by guardian or ward or both.

Where a nonresident minor has no guardian in this state his guardian, appointed and qualified according to the laws of the state where such minor resides, may, by petition to the county court having jurisdiction to appoint a guardian, be authorized to sue for, collect and remove any personal property of the minor, or otherwise act as a guardian appointed here.

Jones' Admr. v. Bell's Guardian, 9 Ky. Opin. 437.

§ 119. Rights of action against guardian or ward or both.

An action against a guardian for money found due an infant must be brought in the name of the infant by his then guardian or next friend.

Cardwell v. Moore, 4 Ky. Opin. 628.

A guardian is not liable for the debts contracted by the ward without his knowledge and consent.

Carter v. Norwood's Admr., 8 Ky. Opin. 166.

§ 121. Defenses by guardian or ward.

Where a guardian, after the death of his ward, pays the ward's estate to the heirs instead of paying alleged creditors of the ward, he must show in defense that the heirs were entitled to the money and that the claims asserted by the creditors are invalid.

Carter v. Norwood's Admr., 8 Ky. Opin. 166.

§ 125. Time to sue and limitations.

Where a guardian has by fraud procured property or an estate which he should hold as trustee for his ward, but holds it until five years have elapsed, he can not be allowed to set up the statute of limitations to defeat the claim of his ward to such property, and a court of equity should re-

strain him from setting up such statute.

Ogden v. Ogden, 10 Ky. Opin. 578.

§ 126. Parties.

In a supplemental proceeding by a guardian to validate a sale of the vendor's property, the purchaser should be made a party.

Huber v. Armstrong, 7 Ky. Opin. 256.

Where an infant is made a party plaintiff by his guardian, he is before the court as much as where he is named a defendant and summons served on his guardian.

Taylor's Guardian v. Talliferro, 10 Ky. Opin. 574.

§ 130. Pleading.

A petition for the sale of land under ch. 86, R. S., relating to the sale of real estate of an infant married woman, must make an exhibit of the title, a clause in the commissioner's deed of the land warranting the title being unauthorized and ineffectual.

Young v. Ingram, 7 Ky. Opin. 464.

Where defendant in his answer to suit of his ward denied that the plaintiff had attained full age before the suit was commenced, to which a demurrer was sustained, the answer denies her right to sue, and was a bar to the action, and the demurrer should have been overruled.

Martin v. Martin, 1 Ky. Opin. 224.

A petition by a ward to ascertain how funds were being held by a guardian, what disposition had been made of the same, the amount due each ward, and to enforce payment, was held to state sufficient allegations to authorize the bringing of the action, and to uphold a judgment for the true amount, when ascertained, against the guardian and his sureties.

Westerman v. Letterle, 4 Ky. Opin. 387.

Where the answer which was not made a cross-petition in an action for a balance due in the hands of a guardian, sets up matter which might have been litigated in a former suit against the guardian by the ward to surcharge the guardian's settlement, and it does not appear that they were

not litigated, a demurrer was properly sustained to the answer.

Richardson v. Richardson, 6 Ky. Opin. 106.

Where, in a suit against a guardian and his bondsmen by the ward, no averment is pleaded showing that the plaintiff is of the age of twenty-one years or older, such omission is waived by an answer which avers such fact.

Goeghegan's Exr. v. Hillson, 8 Ky. Opin. 787.

A report and account made and filed by a guardian and ordered by the court to be recorded, although not formally approved, is prima facie correct, and a petition attacking its correctness, to state a cause of action must specify the objections thereto.

Williams v. Glazebrook, 9 Ky. Opin. 390.

§ 131. Evidence.

As to transactions between a guardian and ward, the presumption of undue influence will be indulged in favor of the ward, where the result was beneficial to the guardian, or intended to be so.

Commonwealth v. Coleman, 6 Ky. Opin. 692.

Where, in making settlements with his ward, the grantor gave the ward notes on third persons, the burden of proof is on the guardian to show the utmost fairness on his part, and that the ward fully understood his legal rights and was fully advised as to the solvency of the payors of the notes.

Commonwealth v. Coleman, 6 Ky. Opin. 692.

§ 133. Judgment.

In a supplemental proceeding by a guardian to validate a judgment and sale, it is not necessary to have the judgment entered of record before issuing a rule against the defendant to show cause why he should not complete the purchase.

Huber v. Armstrong, 7 Ky. Opin. 256.

A joint judgment against a guardian and her husband is erroneous, where the record discloses nothing to sus-

tain a personal judgment against the husband.

Jones v. Bright's Admr., 6 Ky. Opin. 109.

VI. ACCOUNTING AND SETTLEMENT.

§ 137. Duty to account in general.

An account against a guardian, though the evidence conduces to prove a part of same was not just, where the guardian admits the whole amount to be due, and himself became witness to prove it, will be enforced by a judgment of the court, as against a third party.

Higginson v. White, Roach & Co., 2 Ky. Opin. 535.

§ 140. Property subject to charge.

It is doubtful whether a statutory guardian is entitled to receive the wages earned by his ward from a third person, but where such wages are received and are not intended to be included in the guardian's settlement, the ward may recover such sums from his guardian, with interest from the time he arrives at twenty-one years of age.

Webb v. Kinchloe, 9 Ky. Opin. 414.

§ 141. Property to be included.

All moneys or property coming to the hands of a guardian and belonging to his ward must be accounted for by the guardian, and his sureties are liable in the event he makes default.

Collins v. Slaughter, 10 Ky. Opin. 694.

§ 142. Release from liability.

A guardian can not escape liability to the ward in settlement by turning over to him a note on parties of doubtful solvency, which can be collected, if at all, only by the highest degree of diligence, without notifying the ward of the true condition of the maker.

Commonwealth v. Coleman, 7 Ky. Opin. 178.

Where a guardian, in making settlement with his ward assigned him certain notes, it was the duty of the guardian to advise the ward as to the solvency of the payors of the notes, and to advise the ward that unless

he sued on the notes at the first term of court the guardian's liability as surety for the payors would be lost.

Commonwealth v. Coleman, 6 Ky. Opin. 692.

A guardian, in making settlement with his ward, by assigning notes of third persons, can not hold the ward to the strict rules of law regulating contracts of assignment.

Commonwealth v. Coleman, 6 Ky. Opin. 692.

§ 145. Proceedings for accounting.

The fact that an attorney represented the ward in a settlement with his guardian does not authorize the guardian to treat the ward "as a person at arm's length."

Commonwealth v. Coleman, 6 Ky. Opin. 692.

Where a ward over twenty-one years old files exceptions to the final report of his guardian and while same is still pending, and after he is twenty-four years of age, he accepts from the guardian a sum of money, giving a receipt in full to such guardian and directs his exceptions to be dismissed, and such compromise is open and free from fraud, such ward thereby ratifies and confirms such report and is bound by it.

Webb v. Kinchloe, 9 Ky. Opin. 414.

§ 147. Charges.

A parent who is guardian of his only child, cannot be allowed to charge large sums out of the estate of his ward for her clothing, schooling, etc., so as to practically liquidate the estate in his hands.

Gorham v. Betts, 4 Ky. Opin. 476.

It being the duty of a guardian to make proper report, he cannot be heard to complain of irregularities in a commissioner's report charging interest on amounts in his hands from the time of their receipt.

Zamoni v. Zazio, 3 Ky. Opin. 140.

Where, by a will, the principal of a trust fund is not to be used, the guardian, who had the use of the ward's money for two years without interest, cannot complain of a short-

age for said period of expenses for board, etc.

Maddox v. Gossom, 3 Ky. Opin. 509.

§ 148. Credits.

Expenses for proper caring for a minor, payment of funeral expenses, sickness, etc., does not come within the exceptions of § 9, ch. 43, 1st Rev. Stat. (Stan. 578), and is a proper charge by the guardian out of the corpus of the estate.

Zamoni v. Zazio, 3 Ky. Opin. 140.

§ 149. Compensation.

§ 150.—In general.

A guardian, or one assuming to be one, who has charge of his ward's estate, where he is guilty of gross mismanagement and conversion, is not entitled to any compensation for his services as such trustee.

Cotton v. Wolfe, 10 Ky. Opin. 423.

While a guardian may make a contract with an attorney to secure the ward's legal rights, such contract will not control the chancellor in determining the amount of what allowance should be made, since only a reasonable and fair compensation will be allowed.

Green v. Duvall, 13 Ky. Opin. 1095.

§ 153. Form and requisites of account.

Statement of manner of making settlement by a joint owner of accounts and guardian.

Brown v. Mays, 6 Ky. Opin. 259.

§ 160. Opening or vacating.

When a guardian has been derelict in performing his fiducial trusts the presumptions are not in his favor, if not entirely against him, and before a verdict will be reversed for slight irregularities in a commissioner's report, it must be manifest that injustice has been done.

Zamoni v. Zazio, 3 Ky. Opin. 140.

§ 162. Costs and expenses.

In a suit by a guardian to confirm a report previously made, the guardian cannot be allowed an attorney's fee.

Maddox v. Gossom, 3 Ky. Opin. 509.

In a suit by a guardian, to confirm a report previously made, he will not be entitled to his costs, where it is shown that his county court settlement was condemned, by the court from which the appeal is prosecuted; nor will an allowance for an attorney fee to the guardian be sustained.

Maddox v. Gossom, 3 Ky. Opin. 509.

Where a father was appointed guardian for his daughter, and after a long period of time, during which only one settlement was made, the guardian filed suit to settle the account, for the reason that his ward refused to settle with him, it does not justify the entering of costs as against the ward, by reason of the dereliction of the guardian.

Gorham v. Betts, 4 Ky. Opin. 476.

§ 164. Private accounting and settlement.

Though a statutory guardian does not make his settlement with the court as required by law, a circumstance of a settlement with his ward, who is his son, during a number of years, in which the ward claimed nothing against his guardian after becoming of age, will be upheld.

McDowell's Exr. v. McDowell, 4 Ky. Opin. 411.

VII. FOREIGN AND ANCILLARY GUARDIANSHIP.

§ 170. Actions by foreign guardians.

In a suit by a foreign guardian against a resident guardian, a copy of the probate proceedings showing the subsequent appointment of plaintiff as guardian on removal of the ward to the other state, is prima facie evidence of plaintiff's right to relief, and it devolves on the defendant to show the contrary.

Miller v. Barnes, 6 Ky. Opin. 370.

In a suit by a foreign guardian against a resident guardian, it will be presumed that the ward is still an infant, especially where the defendant failed to controvert the fact.

Miller v. Barnes, 6 Ky. Opin. 370.

In a suit by a foreign guardian against the domestic guardian the

ward need not be made a party thereto.

Miller v. Barnes, 6 Ky. Opin. 370.

Under §§ 16 and 17, art. 2, ch. 43, R. S., a foreign guardian is authorized to sue a domestic guardian and his sureties on the guardian's bond for money belonging to the wards, where the domestic guardian refused to pay a judgment therefor.

Starts v. Commonwealth, 7 Ky. Opin. 154.

VIII. LIABILITIES ON GUARDIANSHIP BONDS.

§ 173. Nature and extent in general.

Where a surety on a guardian's bond has been compelled to pay on default of his principal, he will in equity be substituted to all the rights and remedies of the ward, against the principal in the bond and the party who has the actual possession of the estate.

Kenney v. Kidd, 5 Ky. Opin. 546.

Although the guardian and his county court surety became liable on their county court bond for the sum paid him by the commissioner of the circuit court, it being the proceeds of a sale of his ward's property, the sureties in the circuit court bond were under obligations that the money should be kept or disposed of according to law and the orders of the court.

Martin v. Martin, 1 Ky. Opin. 224.

A bond that does not show the name of the guardian, ward or surety, though signed by guardian and his surety, is held not to be a sufficient bond as is required by statute, nor sufficient as an indemnity to a former surety who makes demand for new security, and will therefore not release the former surety.

Brooks v. Morrow, 2 Ky. Opin. 202.

§ 177. Discharge of sureties.

An order of the county court, releasing the surety in a guardian's bond, from past and future responsibility, without taking another bond is void.

Kinnison v. Brook's Admr., 4 Ky. Opin. 340.

A statute requiring a guardian to enter into covenant to an infant with good surety is not violated where the bond is made payable to the state, and the bond is available and effectual to the infant.

Barbour v. Bland, 1 Ky. Opin. 130.

If the appellant had proceeded against his principal under the Acts of 1856, he might have been released from responsibility as surety, but having only required counter-surety in the county court, in that court the obligors bound themselves to hold him harmless.

Duncan's Admr. v. McKee, 1 Ky. Opin. 25.

Where a bond was executed by a guardian in the circuit court in a proceeding for sale of the ward's land, the obligors became responsible to the ward for the price of land, and it was intended to release the appellant surety on a prior bond; but the proper order was omitted by mistake of the clerk, as shown in the evidence received without objection, as the evidence was not objected to, the competency is admitted, and the court is bound to give effect to the circuit court bond.

Duncan's Admr. v. McKee, 1 Ky. Opin. 25.

A surety on an original bond in the county court is released from liability when a new bond is made on an appeal to the circuit court, which is intended to release the original surety.

Duncan's Admr. v. McKee, 1 Ky. Opin. 25.

The counter-security contemplated and required is the execution of a bond or covenant by the guardian with one or more good sureties, approved by the court, who must undertake faithfully to discharge the trust of guardian and to secure the surety making the application from loss and all the liabilities he may have incurred by reason of having been bound as the surety of the guardian; and less than that, the court has no legal power to do, and until that is

done, the former surety remains bound.

Brooks v. Morrow, 2 Ky. Opin. 202.

When it is required of a guardian and he gives his surety counter-security, it may be proper and the county court might be authorized to release the surety requiring the counter-security of the guardian; but, until such requirement is complied with, the court has no authority to release any surety.

Brooks v. Morrow, 2 Ky. Opin. 202.

Where a guardian is allowed upon his own motion in the county court to execute a new bond for the express purpose of releasing from liability his surety upon his original bond, and the new bond is executed, approved and accepted by the court, the former surety is discharged of all liability whatever, and the new bond is not accumulative surety.

Duncan's Admr. v. Jenkins, 4 Ky. Opin. 192.

The sureties, in each bond, where a guardian is under two separate bonds, are liable to the ward for any money which came to the hands of their principal whether received before or after the date of the bond upon which they are sureties.

Stiff v. Stiff, 8 Ky. Opin. 631.

The fact that the court made no order requiring the guardian to pay the money of his ward into court or to account for it, will not release the surety on his bond; since it is the duty of such surety to see that the money in the hands of the guardian was paid into court or invested in other property, and until this is done the surety's liability continues.

Farmsworth v. Lanam, 9 Ky. Opin. 770.

§ 182. Actions.

Where a foreign guardian sues the domestic guardian and the sureties on his bond for money belonging to the wards, and sets out in his petition a judgment for money due the wards and failure to pay, a sufficient cause of action is shown.

Starts v. Commonwealth, 7 Ky. Opin. 154.

A ward is entitled to sue for and receive her portion of the proceeds of a sale received by her guardian; and she is not bound to sue the county court sureties jointly with the obligors in the circuit court bond.

Martin v. Martin, 1 Ky. Opin. 224.

In a suit on a guardian's bond, a judgment against the principal alone is erroneous, since it should be against the principal and his sureties.

Vaughn v. Edwards, 2 Ky. Opin. 490.

Where a ward obtained judgment against sureties, who were solvent, and severally as well as jointly liable upon a bond that was a nullity, the sureties cannot complain of the error in the bond without objection below.

Kinnison v. Brook's Admr., 4 Ky. Opin. 340.

A judgment in a suit on a guardian's bond is excessive which is for a greater sum than demanded by the petition.

Hutchinson v. Jett, Guardian, 8 Ky. Opin. 160.

The petition in a suit on guardian's bond must set forth in terms or substance the conditions in the bond which is the foundation of the action, and making the bond an exhibit can not take the place of such averments.

Hutchinson v. Jett, Guardian, 8 Ky. Opin. 160.

It is not necessary to sue in the name of the state to recover on a guardian's bond; since such a suit should be brought in the name of the ward by his next friend or guardian.

Hutchinson v. Jett, Guardian, 8 Ky. Opin. 160.

Where, in a suit on a former guardian's bond, it is averred that a new guardian has been appointed, it will be presumed by the court of appeals that the former guardian had resigned or been discharged.

Hutchinson v. Jett, Guardian, 8 Ky. Opin. 160.

GUARDS.

Prison guards — Compensation, see Prisons, § 8.

HABENDUM.

Office of, see Deeds, § 28.

HANDWRITING.

Comparison of, see Evidence, § 480.

Proof of, see Evidence, XII, E.

HARMLESS ERROR.

See Appeal, XVI, H; Criminal Law, § 1161.

As to admission of evidence, see Appeal, § 1049.

As to instructions given, see Appeal, § 1026; Criminal Law, § 1172.

Erroneous instruction, see Homicide, §§ 340, 348.

Errors favorable to complaining party, see Appeal, § 1033.

Evidence of character of witness, see Appeal, § 1050.

Exclusion of evidence, see Homicide, §§ 333, 339.

Giving or refusing to give instructions, see Criminal Law, § 1172.

Instructions as to malice, see Criminal Law, § 1172; Homicide, § 340.

Instructions as to murder, see Criminal Law, §§ 1172, 1186.

Instruction as to murder—Conviction of manslaughter, see Homicide, § 340.

Order discontinuing case, see Appeal, § 1026.

Overruling exceptions to testimony, see Trial, § 99.

Overruling motion to strike out attachment proceeding, see Appeal, § 1046.

Presumption as to effect of error, see Appeal, § 1031.

Refusal to give instruction, see Appeal, § 1064.

Refusal to permit exhibits to be read to jury, see Appeal, § 1057.

Rulings as to evidence, see Criminal Law, § 1168.

Submission of issues to jury, see Appeal, § 1062.

Technical errors, see Appeal, § 1026.

Trivial error in amount of judgment,

see Appeal, § 1026.
Variance between prayer and verdict,
see Appeal, § 1039.

HAWKERS AND PEDDLERS.

§ 2. Statutory and municipal regulations.

§ 7. Offenses.

§ 2. Statutory and municipal regulations.

Chapter 84, §§ 1 and 2, requiring peddlers to take out and pay for licenses, applies to all itinerant persons vending goods, etc., whether citizens of this state or not.

Commonwealth v. Creel, 11 Ky. Opin. 575.

§ 7. Offenses.

A conviction for selling lightning rods as a peddler can not be sustained, where the evidence shows that pursuant to an agreement the defendant furnished and put up lightning rods for one man only, on one building, and does not show whether such rods were sold at defendant's store or elsewhere.

Commonwealth v. Goodman, 9 Ky. Opin. 237.

HEARSAY EVIDENCE.

See Evidence, IX; Homicide, § 169.

HEIRS.

Actions against, see Descent and Distribution, §§ 92, 137.

Action between, see Descent and Distribution, § 73.

As used with reference to personal estate, see Descent and Distribution, § 20.

Equalizing, see Descent and Distribution, § 73.

Interests of subject to execution, see Execution, § 44.

Liability for debts of deceased ancestor, see Descent and Distribution, III, C, §§ 119, 125.

Liability for overplus received, see Descent and Distribution, § 86.

Necessary party to proceedings to sell real estate to pay debts, see Executors and Administrators, § 356.

Pleading heirship, see Executors and Administrators, § 314.

Rights and liabilities of, see Descent and Distribution, III.

Rights of creditors of, see Descent and Distribution, III, D.

Right to sue for claim due deceased, see Descent and Distribution, § 91.

When necessary party to action, see Parties, § 28.

When payment to administrator is payment to heirs, see Payment, § 5.

HIGHWAYS.

I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(A) ESTABLISHMENT BY PRESCRIPTION, USER, OR RECOGNITION.

§ 1. Nature and essentials of highway by prescription.

§ 6. Duration and continuity of use.

§ 9. Use and recognition of pre-existing road or other way.

(B) ESTABLISHMENT BY STATUTE OR STATUTORY PROCEEDINGS.

§ 19. Constitutional and statutory provisions.

§ 35. Commissioners or viewers.

§ 41.—Report and proceedings in general.

§ 61. Costs and expenses of proceedings.

(C) ALTERATION, VACATION OR ABANDONMENT.

§ 74. Vacation.

§ 75.—In general.

§ 77.—Proceedings.

§ 79. Abandonment.

(D) TITLE TO FEE AND RIGHTS OF ABUTTING OWNERS.

§ 80. Title to fee in general.

II. HIGHWAY DISTRICTS AND OFFICERS.

§ 96. Duties and liabilities.

III. CONSTRUCTION, IMPROVEMENT AND REPAIR.

§ 105. Authority and duty to maintain or repair.

§ 108. Criminal responsibility for failure to maintain or repair.

§ 117. Liabilities for expenses or damages.

§ 118.—In general.

V. REGULATION AND USE FOR TRAVEL.

(A) OBSTRUCTIONS AND ENCROACHMENTS.

§ 153. Obstruction of use of highway in general.

§ 155. Persons entitled to remedies.

§ 162. Criminal responsibility.

§ 163.—Offenses.

§ 164.—Prosecution and punishment.

(C) INJURIES FROM DEFECTS OR OBSTRUCTIONS.

§ 201. Actions for injuries.

§ 216.—Appeal and error.

See Bridges; Dedication; Private Roads; Streets; Turnpikes and Toll Roads.

As boundary lines, see Boundaries, § § 19, 20.

I. ESTABLISHMENT, ALTERATION AND DISCONTINUANCE.

(A) ESTABLISHMENT BY PRESCRIPTION, USER, OR RECOGNITION.

§ 1. Nature and essentials of highway by prescription.

A passway may become a public highway by continuous and uninterrupted use by the public.

Moore & Mason v. Sparks, 8 Ky. Opin. 425.

§ 6. Duration and continuity of use.

The non-user for thirty or forty years, and use of another line of road well marked and defined and worked by the overseers is sufficient to establish the fact as between the commonwealth and the defendant that the road used was the county road, and there being evidence of these facts the defendant was entitled to an instruction presenting such defense.

Tingle v. Commonwealth, 9 Ky. Opin. 111.

§ 9. Use and recognition of pre-existing road or other way.

After the continued and uninterrupted use of a passway by the public for a period of time, sufficient to perfect a title by prescription, coupled with the fact that the local public has at all times exercised the right

to keep the passway in repair, an acceptance may be presumed.

Moore & Mason v. Sparks, 8 Ky. Opin. 408.

(B) ESTABLISHMENT BY STATUTE OR STATUTORY PROCEEDINGS.

§ 19. Constitutional and statutory provisions.

Before the public can take private property for a public highway or for any other public purpose against the consent of the owner, the provisions of the statute authorizing it must be substantially complied with.

Ott v. Graves, 9 Ky. Opin. 86.

§ 35. Commissioners or viewers.

§ 41.—Report and proceedings in general.

Viewers, in making their report, should show the convenience and inconvenience which will result to individuals as well as to the public in the opening, discontinuance or altering of a public road.

Peak v. Williams, 6 Ky. Opin. 414.

Where viewers, in their report, show that the closing of the road would be of some disadvantage to a named person, they should show in their report whether or not the discontinuance of the road would cut him off from a public highway, or increase the distance he would have to travel to reach a highway, or state the facts upon which they based their opinion that he would be subjected to inconvenience by the closing of the road.

Peak v. Williams, 6 Ky. Opin. 414.

A report of viewers should state all the inconveniences accruing to the owners who are affected, and to others, so that the court may determine whether the inconvenience shall be suffered for the public good, and what damages may be properly assessed.

Mitchell v. Baker, 7 Ky. Opin. 24.

The viewers' report upon which a new highway is ordered opened must contain a description of the road by courses and distances, and to comply with this rule the points of its com-

mencement and termination should be fixed by some visible objects sufficient to determine their exact locality.

Jacoby v. Neal, 8 Ky. Opin. 647.

A description in the viewer's report upon the location of a public highway and in the order of the court approving such report and establishing such highway, is fatally defective which names as the starting point a place designated upon the surveyor's map as point 6, but fails to describe such point by anything on the land or with reference to any object recorded or existing.

Jacoby v. Neal, 8 Ky. Opin. 647.

§ 61. Costs and expenses of proceedings.

Where, in a proceeding to change or establish a highway, there is judgment on appeal to the circuit court that the highway be not changed, the costs are to be paid by the county court, and it is error to adjudge costs against one who has successfully resisted the establishment of such highway.

Grider v. Porter, 13 Ky. Opin. 532.

(C) ALTERATION, VACATION OR ABANDONMENT.

§ 74. Vacation.

§ 75.—In general.

Under the provisions of Gen. Stat. (1879), ch. 110, § 13, requiring dirt roads within one mile of turnpikes to be closed, with certain exceptions, a dirt road will not be closed when at some points it is less and at others it is at a greater distance than one mile from a turnpike, leading to and being between the same points, where it is shown that the dirt road was established first, is nearer from point to point of intersection than the turnpike, where its being closed would shut out some of the people living along the dirt road from any public way and where such dirt road is not used for the sole purpose of avoiding the payment of tolls on the turnpike.

Anderson v. Carrick, 11 Ky. Opin. 312.

§ 77.—Proceedings.

The use of the words, "about ten

feet north," in a suit for a discontinuance of a public road, to designate the terminus of the part of the road sought to be abandoned, is sufficiently certain as a description of the point it was desired to discontinue at.

Moore & Kenney v. Stone, 2 Ky. Opin. 383.

§ 79. Abandonment.

The close proximity of a public road constantly used, to one which is beneficial only to a few nearby private individuals, where it is shown that there is not sufficient labor to keep both in repair, will justify the abandonment of the lesser used road by order of the court.

Moore & Kenney v. Stone, 2 Ky. Opin. 484.

(D) TITLE TO FEE AND RIGHTS OF ABUTTING OWNERS.

§ 80. Title to fee in general.

The purchaser of land over which a road runs is bound by the same estoppel that would have bound the vendor had he retained the title, and it can not escape the effect of such estoppel because the public trespassed upon the property when it was uninclosed, nor because it was allowed to encroach upon the highway without complaint.

Trustees of Princeton College v. Board of Trustees of Princeton, 7 Ky. Opin. 121.

II. HIGHWAY DISTRICTS AND OFFICERS.

§ 96. Duties and liabilities.

In an action against the superintendent of roads to compel him to turn over the property and funds in his hands to his successor, the fact that the county court appointed an agent to demand and receive the property and money in the defendant's hands should be alleged, the mere statement that he was the proper officer or agent being a mere conclusion, and insufficient.

Commonwealth v. Osborne, 7 Ky. Opin. 393.

III. CONSTRUCTION, IMPROVEMENT AND REPAIR.

§ 105. Authority and duty to maintain or repair.

The public is under no obligation to keep in repair a greater portion of a road than the necessity requires, and failure to do so does not affect the question of dedication.

Trustees of Princeton College v. Board of Trustees of Princeton, 7 Ky. Opin. 121.

§ 108. Criminal responsibility for failure to maintain or repair.

Overseers and hands on roads are punishable for not keeping highways in repair.

Beaver v. Marion County, 11 Ky. Opin. 577.

§ 117. Liabilities for expenses or damages.

§ 118.—In general.

Where a road becomes impassable and one makes a permanent improvement thereof in repairing it, the county is liable to compensate him.

Beaver v. Marion County, 11 Ky. Opin. 577.

V. REGULATION AND USE FOR TRAVEL.

(A) OBSTRUCTIONS AND ENCROACHMENTS.

§ 153. Obstruction of use of highway in general.

If a man close up a public highway, whereby it is stopped up to the use of the public, it is a nuisance, common to all, for which he may be prosecuted by the commonwealth, but a suit against him cannot be maintained by a private individual.

Coburn v. Whirner, 5 Ky. Opin. 17.

One who uses a public highway cannot enjoin its obstruction unless he is able to show a special injury to himself, and he is then entitled to relief, not because a public highway has been obstructed, but because of the special and peculiar damages he sustains.

Moore & Mason v. Sparks, 8 Ky. Opin. 425.

One can not be guilty of obstructing a public highway by erecting a fence across it, where there has been a proceeding to change the highway, and the new way has been opened and used by the public in lieu of the one obstructed; the establishment of the new being a discontinuance of the old, and this is true even in the absence of a formal order accepting the new or abolishing the old road.

King v. Commonwealth, 10 Ky. Opin. 7.

§ 155. Persons entitled to remedies.

One having a common interest in a public highway, which belongs equally to all and in which the party suing has no special or peculiar property, he cannot maintain a suit for obstruction, as an obstruction would be a nuisance common to all.

Hahn & Harris v. Figg, 5 Ky. Opin. 547.

Where a party sustains special damages on account of the obstruction of a highway, the party thus injured may sue in his own name.

Hahn & Harris v. Figg, 5 Ky. Opin. 547.

§ 162. Criminal responsibility.

§ 163.—Offenses.

In a prosecution for obstructing a public highway, it is not necessary to describe the particular part of the highway obstructed, but it is sufficient for the indictment to designate it by name and to specify the character of obstruction, etc.

Commonwealth v. Dunivant, 11 Ky. Opin. 569.

§ 164.—Prosecution and punishment.

Where in a criminal case one is charged with obstructing a public highway, the question of whether the way obstructed was a public highway should be submitted to the jury.

Barnard v. Commonwealth, 8 Ky. Opin. 760.

In an indictment for obstructing a public highway it is necessary to describe the highway claimed to have been obstructed, and a description is not sufficient which describes a highway only by giving its number; but there should be such a description as

will enable one familiar with the county to know from reading the indictment what road was intended.

Commonwealth v. Crawford, 11 Ky. Opin. 14.

(C) INJURIES FROM DEFECTS OR OBSTRUCTIONS.

§ 201. Actions for injuries.

§ 216.—Appeal and error.

There being no provision of the civil code regulating the manner of appeals from the county courts in highway cases, such appeals must be prosecuted under the common law, and tried as appeals and not de novo.

Bennett v. Bryan, 10 Ky. Opin. 711.

HOLDING OVER.

By tenant, see Landlord and Tenant, § 196.

HOMESTEAD.

I. NATURE, ACQUISITION, AND EXTENT.

(A) NATURE, CREATION, AND DURATION OF ESTATE OR RIGHT IN GENERAL.

§ 4. Validity of statutes.

§ 6. Retroactive operation.

§ 7.—Liabilities and lien existing before homestead law.

§ 8.—Liabilities existing before acquisition or establishment of homestead.

§ 12. Nature and extent of right created.

(B) PERSONS ENTITLED.

§ 18. Head of family and members thereof.

§ 19. Householders.

§ 20. Housekeepers.

§ 21. Married women.

§ 22. Children.

§ 25. Residence.

§ 26.—Domicile in general.

§ 27.—Residing with family.

§ 28.—Absence or removal.

§ 28½. Right of sheriff as against liability for public revenue.

(C) ACQUISITION AND ESTABLISHMENT.

§ 33. Character and mode of occupancy.

§ 55. Time of acquisition of homestead exemption.

(D) PROPERTY CONSTITUTING HOMESTEAD.

§ 58. Nature of property in general.

§ 59. Manner of acquisition.

§ 61. Amount or extent.

§ 62.—In general.

§ 69. Form and physical characteristics.

§ 70. Separate tracts or lots.

§ 75. Proceeds of homestead.

§ 76.—In general.

§ 78.—Involuntary conversion.

§ 81. Ownership, estate, or interest in property in general.

§ 82. Life estates.

§ 84. Property of tenants in common and joint tenants.

§ 88. Equitable estates and interests.

§ 89. Different homesteads in same property.

(E) LIABILITIES ENFORCEABLE AGAINST HOMESTEAD.

§ 90. Exceptions from exemptions in general.

§ 92. Exception of pre-existing liabilities and liens.

§ 95.—Liabilities existing before establishment of homestead.

§ 96. Purchase-money and lien or mortgage therefor.

§ 97. Claims and liens for creation, improvement, or preservation of property.

II. TRANSFER OR INCUMBRANCE.

§ 112. Sale or exchange.

§ 115. Mortgage.

§ 118. Joinder of husband and wife in deed or mortgage.

III. RIGHTS OF SURVIVING HUSBAND, WIFE, CHILDREN, OR HEIRS.

§ 140. Rights of surviving husband.

§ 141. Rights of surviving wife.

§ 142. Rights of children or heirs.

IV. ABANDONMENT, WAIVER, OR FORFEITURE.

§ 154. Loss or relinquishment of right in general.

§ 156. Separation of family.

§ 160. Removal from homestead.

§ 161.—In general.

§ 162.—Intent to return.

§ 163.—Acts constituting abandonment.

§ 167. Sale and conveyance.

§ 169. Power to waive.

§ 170. Contracts waiving right in general.

§ 171. Mortgage or other incumbrance as waiver of rights.

§ 172. Consent to levy and sale.

§ 177. Estoppel to claim homestead.

V. PROTECTION AND ENFORCEMENT OF RIGHTS.

§ 182. Establishment of right of exemption in general.

§ 198. Allotment.

§ 199.—Proceedings in general.

§ 203. Sale of property subject to homestead.

§ 208. Actions and defenses.

§ 213.—Pleading.

§ 214.—Evidence.

§ 217.—Judgment and enforcement thereof.

Expressly reserved in mortgage, see Mortgages, § 533.

In partnership real estate, see Dower, § 17.

Judicial sale subject to homestead right, see Judicial Sales, § 50.

Purchase-money lien has priority over homestead, see Vendor and Purchaser, § 261.

Right to both dower and homestead, see Dower, § 59.

I. NATURE, ACQUISITION, AND EXTENT.

(A) NATURE, CREATION, AND DURATION OF ESTATE OR RIGHT IN GENERAL.

§ 4. Validity of statutes.

So much of the homestead act as limits its benefit to white persons only is invalid.

Eubank v. Eubank, 13 Ky. Opin. 673.

§ 6. Retroactive operation.

§ 7.—Liabilities and liens existing before homestead law.

Where a debt was created before the passage of the homestead act, or the purchase of the land was made or improvements were erected after the creation of the debt, no homestead claim can be asserted as against such debt.

Hope v. Hollis, 12 Ky. Opin. 287.

The sale of real estate on execution in 1868, after the passage of the Home-

stead Act of 1866, did not divest either the husband or his wife of their homestead right; but where the debts were created prior to the passage of the homestead act, the homestead right can not be asserted against them.

Kennedy v. Jeff, 12 Ky. Opin. 350.

A renewal of a note given before the passage of the homestead exemption act of June, 1866, is not a satisfaction of the debt, but only changes the evidence of it, and the debt will be regarded as created before the date of said act.

Miller v. Clemmons, 12 Ky. Opin. 748.

The homestead law took effect June 1, 1866, and of course no exemption can be taken under it as to any debt created prior to that date, and where the evidence is conflicting as to whether a debt was created before or after the law took effect, this court will not reverse the trial court's judgment.

Witherspoon v. Sears, 13 Ky. Opin. 526.

§ 8.—Liabilities existing before acquisition or establishing of homestead.

A homestead is not exempt from execution as to a debt, which existed prior to its purchase.

Herreld v. Skille's Assignee, 13 Ky. Opin. 353.

A homestead is not exempt from execution to pay a debt contracted prior to its purchase.

Ashley v. Terry, 13 Ky. Opin. 405.

§ 12. Nature and extent of right created.

A widow is not entitled to a homestead in addition to dower.

Donaldson v. Donaldson's Admr., 9 Ky. Opin. 618.

(B) PERSONS ENTITLED.

§ 18. Head of family and members thereof.

The wife can assert no claim to a homestead without the consent of the husband and his uniting with her, it being the husband who must assert the right, and not the wife; and such

right passes to the wife and children only upon the death of the husband.

Ward v. Gault, 9 Ky. Opin. 609.

During the life of the husband the wife has no interest in his real estate, and the homestead act was not intended to give her any; and all she has is the power to prevent a mortgage, release or waiver by the husband of the exemption given him; and she can not compel her husband to assert his right to the exemption, nor can she assert it for him or for herself during his life.

Jones v. Williams, 10 Ky. Opin. 162.

§ 19. Householders.

Bachelors residing on land with a nephew and brother can not legally assert a homestead right, where the brother is of full age and has the mental and physical ability to maintain himself, and the nephew has parents living able to support him during his minority, and such bachelors have no control over him except such as is sanctioned by his parents.

National Bank of Lancaster v. Slavin's Trustee, 10 Ky. Opin. 739.

§ 20. Housekeepers.

A bona fide housekeeper with a family residing on his mortgaged land is entitled to homestead exemption in the absence of a valid release or waiver of the homestead right according to the provisions of the statute.

Young v. Phillips, 8 Ky. Opin. 712.

If the judgment debtor is an actual bona fide housekeeper of Kentucky at the time the creditor attempts to make his debt by levy, and the debt was incurred after the passage of the homestead law, and after the debtor has acquired the land and erected the buildings where he resides, he is entitled to the benefit of the law.

Kinney v. Wheeler, 10 Ky. Opin. 40.

§ 21. Married women.

A widow who derives the whole estate of her husband by and through his will has no claim of a homestead in the land.

Best v. Burnam, 11 Ky. Opin. 388.

Where a widow, by the will of her husband, is given a life estate in certain lands and liens on the land, keeping house with her children, she is entitled to claim dower in the land as against creditors.

Burns v. Hoffman, 11 Ky. Opin. 549.

§ 22. Children.

Infant children are entitled to a homestead in the land of their father, although he left no widow, as against either creditors or his adult children.

Higginbotham v. Meadows, 13 Ky. Opin. 374.

§ 25. Residence.

A nonresident has no homestead right in this state, and, even if a resident here, a homestead can not be asserted against a mortgage for purchase-money of the real estate.

Lemcole v. Shaw's Exrs., 11 Ky. Opin. 38.

One can not acquire a right to a homestead exemption in a tract of land upon which he never resided and of which he never even had possession.

Hicks v. Soaper, 13 Ky. Opin. 95.

§ 26.—Domicile in general.

One owning a house and lot, but who does not reside in such house, is not entitled to claim an exemption as a homestead.

Hayden v. Craycroft, 9 Ky. Opin. 697.

§ 27.—Residing with family.

When one owns land but has no residence upon it, but has built a house on his wife's land and resides there with his family, he can not claim a homestead on his own land as against his creditors.

Magruder v. Sparks, 9 Ky. Opin. 643.

§ 28.—Absence or removal.

Where one has used and cultivated his land but has not lived upon it he can not claim a homestead right as against his creditors.

Moore v. Phillips, 13 Ky. Opin. 588.

Where a husband before marrying a second time gave to his son a part of

the lot on which he lived, measured it off and agreed to convey it to him, the son built a house upon it and the father died without making such conveyance, the widow is not entitled to any homestead right in it, she and her husband not living upon it at the time of his death.

Eubank v. Eubank, 13 Ky. Opin. 673.

§ 28½. Right of sheriff as against liability for public revenue.

A sheriff is not entitled to a homestead exemption as against his liability to the commonwealth or to the county for the public revenue collected by him.

Devor v. Woolford, 10 Ky. Opin. 110.

(C) ACQUISITION AND ESTABLISHMENT.

§ 33. Character and mode of occupancy.

The right to homestead as against a creditor does not depend upon the debtor occupying it at the time the debt is created, but upon the fact that the debt was incurred after June 1, 1866, and the further fact that the debt or liability did not exist at the acquisition of the homestead lands or the erection of the improvements thereon.

Kinney v. Wheeler, 10 Ky. Opin. 40.

§ 55. Time of acquisition of homestead exemption.

Where the debts evidenced by the several mortgages were created after the improvements had been made and when the appellant was living on the premises, he is entitled to a homestead.

Kraft v. Schmidt's Exr., 10 Ky. Opin. 900.

(D) PROPERTY CONSTITUTING HOMESTEAD.

§ 58. Nature of property in general.

Where a house and lot sought to be subjected to a debt was owned by the debtor before any of the debts owing to plaintiff were contracted, and the property was worth less than \$1,000.00, and the debtor was a bona fide house-

keeper with a family, living upon rented property and owning no other real estate except such house and lot, and he did not use the house as a residence, because of the fact that it had not been completed, and the debtor sold it to N, and N sold it to the debtor's wife, no consideration passing, and the debtor manifested an intention to occupy the house when completed, the house and lot were exempt from sale under execution, attachment or judgment of any court, and, although the conveyance was made without consideration and with possible intent to defraud creditors, still the property was not subject to the payment of the debtor's debts before the conveyance, and the fact that the title passed to his wife does not change its status.

Buckner & Co. v. Wingford, Newkirk & Co., 5 Ky. Opin. 391.

Land including the dwelling-house and appurtenances owned by the debtor not exceeding in value one thousand dollars, is exempt as a homestead; and neither the presumption that the officer in making a levy on such land did his duty nor the mistake in valuation or fraudulent valuation by appraisers can bar them of their right to a homestead of one thousand dollars in value.

Marshall v. Van Meter, 11 Ky. Opin. 491.

Where the debtor's real estate is sold on a mortgage foreclosure, and there is more money than is required to pay the mortgage, the debtor, if entitled to the homestead at all, and if he claims it, is entitled to the excess of proceeds, and the chancellor has no right to inquire of him whether his purpose is to invest it in another home or not, but thereafter if he deals with it in a way to show an intention not to invest it, the creditor may seize it.

Schmidt v. Oliges, 12 Ky. Opin. 753.

§ 59. Manner of acquisition.

The wages of a married woman for services and labor performed by her are free from the debts and control of the husband, since the act of April

4, 1873 (I Acts 1873, ch. 768), and such married woman may purchase therewith a homestead which is also free from his debts and control.

Carter v. Drewery, 12 Ky. Opin. 37.

§ 61. Amount or extent.

§ 62.—In general.

A person entitled to a homestead exemption is entitled to have set apart for him land upon which a house is located, unless such house and appurtenances exceed in value \$1,000.00, and if they do, he is entitled to \$1,000.00 in money out of the sale of the property.

Young v. Phillips, 8 Ky. Opin. 712.

Where the homestead claimed is shown not to be worth exceeding \$1,000, the chancellor does not err in refusing to subject it to sale for the mere purpose of ascertaining whether it would bring more money.

Thomasson v. Little, 13 Ky. Opin. 1045.

§ 69. Form and physical characteristics.

The right of a debtor and his family to a homestead extends to land on which he has an actual bona fide residence.

West v. Irving & Campbell, 6 Ky. Opin. 715.

The homestead exemption law applies to land upon which the debtor lives and owns at the time of rendition of judgment, if he is a bona fide householder with a family.

Davis v. Davis, Trabue & Co., 6 Ky. Opin. 487.

There can be no waiver of a homestead by a husband and wife except in the mode provided by the statute, and there being no statute by which infants can waive the homestead they have no such right.

Lawrence v. Lawrence's Admr., 10 Ky. Opin. 353.

§ 70. Separate tracts or lots.

Where husband and wife live on the wife's land, the fact that the husband owns an adjoining tract makes it no part of the homestead.

Crabtree v. Rosenfield, 8 Ky. Opin. 125.

When a landowner owns and cultivates twenty-one acres of land composed of a seven-acre tract and a fourteen-acre tract, divided by a small tract belonging to another, he residing on the seven-acre tract, worth less than one thousand dollars, he is entitled to claim his homestead exemption as against a levy on the fourteen acres for the excess over the value of the seven acres up to one thousand dollars.

Watson v. Strunett, 10 Ky. Opin. 259.

The Gen. Stat. 1881, ch. 38, § 9, which exempts "so much land including the dwelling-house and appurtenances owned by the debtor, as shall not exceed in value \$1,000," does not require that the land shall all be in the same parcel or body, nor that the dwelling-house shall be located on the land to be exempted; and two separate tracts of land may be held as exempt if together they do not exceed in value \$1,000.

Nichols v. Sennet, 12 Ky. Opin. 38.

§ 75. Proceeds of homestead.

§ 76.—In general.

The owner of a homestead may sell and reinvest in another homestead which will be protected from creditors the same as the first.

White & Co. v. Wilder, 10 Ky. Opin. 836.

§ 78.—Involuntary conversion.

Where a debtor was arrested under Civ. Code, ch. 1, art. 8, and was released by depositing in the hands of the sheriff as surety for the debt and costs, a sum of money in lieu of bail, under § 186 of the Code, which was the proceeds of defendant's homestead, which had been sold under execution by the sheriff, and the proceeds were paid the defendant to purchase another homestead, an order of return of such money to the defendant was erroneous.

Childers v. Barnes, 6 Ky. Opin. 65.

§ 81. Ownership, estate, or interest in property in general.

The debtor claiming a homestead exemption must be the owner of the property, including the dwelling house, not a joint owner nor an owner

in common with others, but the owner of a life estate is entitled to the exemption.

Allin v. Robinson's Exr., 8 Ky. Opin. 478.

One can not claim a homestead in the land of another, and where the court finds from the evidence that such land does not belong to the claimant of a homestead, the Court of Appeals will not reverse such finding on the mere weight of the evidence.

Neal v. Elms, 9 Ky. Opin. 769.

Before one is entitled to claim a homestead, he must have a title legal or equitable to the land, and except in cases where it passes to the wife and widow from the husband the right to a homestead can not exist without title.

Simpkinson & Co. v. Pierce, 12 Ky. Opin. 542.

§ 82. Life estates.

Where a life tenant is entitled to a homestead right, if the life estate is worth more than \$1,000 the creditors can subject the property to pay their claims by first paying to her \$1,000; but in case the property is divisible, as much of it as is of the value of \$1,000 may be set apart to the life tenant, and the balance subjected to creditors' claims.

Adams v. Adams, 10 Ky. Opin. 373.

One vested with a life estate in real estate is as much entitled to a homestead as if he held the fee simple title.

Adams v. Adams, 10 Ky. Opin. 373.

§ 84. Property of tenants in common and joint tenants.

Where one inherits an undivided interest in ten acres of land and by consent of the other heirs builds a house on a part of it, which they agree may be set off to him, he is entitled to his exemption even before the land is partitioned and conveyed to him, but where the debt was created and execution issued before the improvements were made, these improvements may not be held as against such prior debts.

Dwelly v. Galbraith, 12 Ky. Opin. 40.

§ 88. Equitable estates and interests.

Persons who execute a mortgage on their real estate thereby waive their right to a homestead exemption on such property.

McCarley's Exr. v. Perkins, 8 Ky. Opin. 493.

Where a husband mortgages his real estate, his wife not joining therein, he is entitled to claim a homestead in such property as against the mortgage, and the right continues as against the mortgagee, notwithstanding the death of his wife.

Dixon v. McClure, 10 Ky. Opin. 392.

§ 89. Different homesteads in same property.

Two homestead exemptions can not be claimed in the same real estate.

Allin v. Robinson's Exr., 8 Ky. Opin. 478.

(E) LIABILITIES ENFORCEABLE AGAINST HOMESTEAD.

§ 90. Exceptions from exemptions in general.

In the settlement of an estate under a deed of trust for the payment of debts, where some claims of creditors are older and some younger than the homestead exemption law, there should be a pro rata distribution of all the debtor's estate, except the homestead, among all the creditors, and if this fails to satisfy all the debts, those whose debts are older than such homestead laws are entitled to have a sale of the homestead in satisfaction of the balance due them.

Shanklin v. Harshfield, 9 Ky. Opin. 469.

§ 92. Exception of pre-existing liabilities and liens.

The widow of a grantee of 44 acres of land, upon which she lives, is entitled for herself and infant son, as against her husband's creditors, to a homestead of the value of \$1,000 to be laid off to her so as to include the dwelling-house, but her homestead lien is subject to a lien of her husband's father and mother who conveyed the

land to him, reserving in the deed a lien of \$75 per year for their benefit.
Walker v. Prethoff, 11 Ky. Opin. 143.

While a judgment determining the right of a debtor to a homestead will not preclude a creditor from an attempt to subject the homestead to a debt incurred prior to the passage of the homestead law, still, an effort to show by parol testimony after the lapse of twenty years that the debt was created as far back as the year 1850 will fail unless the proof is clear and conclusive.

Edmonson v. Green, 11 Ky. Opin. 433.

Where one has a lien superior to a homestead lien and the property is sold at judicial sale for a sum sufficient to satisfy both liens, the lienholder waives his right to have executed to him the purchaser's sale bonds, the homestead claimant takes a bond for \$1,000 and the holder of the superior lien takes a mortgage from the purchaser, and the purchaser and his bondsmen become insolvent so the homestead claimant's bond can not be collected, and the property is again sold on foreclosure of the lienholder's mortgage for just enough to pay the mortgage and costs,—under these facts it is held that the mortgage lienholder, having refused to accept the purchaser's bonds on the first sale, elected to rely upon his mortgage, and the homestead claimant's lien of \$1,000 was prior to the mortgage lien.

McLaughlin v. List, 12 Ky. Opin. 301.

§ 95.—Liabilities existing before establishment of homestead.

Where a debt is incurred after the debtor receives conveyance of real estate and after the homestead law was passed, if otherwise qualified the owner is entitled to claim the homestead as against such debt.

Colvin v. Stinnett, 12 Ky. Opin. 196.

§ 96. Purchase-money and lien or mortgage therefor.

One is not entitled to a homestead exemption as against a purchase-money lien, nor is a debtor entitled

to a homestead as to debts created before he occupies the premises as a homestead.

Coconongher v. Coconongher, 16 Ky. Opin. 168.

A homestead exemption can not be asserted by the owner of real estate so as to defeat a lien for the balance of purchase-money.

Riley v. Filmore, 11 Ky. Opin. 745.

A homestead right can not be asserted as against a note for money advanced to pay the purchase price of land.

Miller v. Jones, 13 Ky. Opin. 59.

No land is exempt as a homestead from the payment of the purchase-money due therefor.

Harrod v. Johnson, 12 Ky. Opin. 268.

Where a note is given for borrowed money to pay a part of the purchase-money of a tract of land and to secure its payment a lien was given on the land the same day, the purchaser can not claim a homestead in the land against such note.

Broomfield v. Broomfield, 13 Ky. Opin. 571.

Where lien notes are held for the purchase-money of real estate, no homestead can be asserted against it.

Glidewell v. Johnson's Admr., 13 Ky. Opin. 858.

§ 97. Claims and liens for creation, improvement, or preservation of property.

A vendor's lien is superior to the vendee's right to a homestead, but such vendor may waive his lien by taking other security with the intention of making the waiver, and if the vendee's note is for purchase-money his homestead right yields to it.

Carpenter's Exr. v. Kearns, 12 Ky. Opin. 9.

II. TRANSFER OR INCUMBRANCE

§ 112. Sale or exchange.

A husband and wife may sell and convey the homestead, since it being

exempt the husband's creditors can not be injured by such action.

Davis v. Davis, Trabue & Co., 6 Ky. Opin. 487.

A homestead belonging to infant children should not be sold at the instance of the father's creditors, unless the property could be sold for a price exceeding a thousand dollars.

Dillard v. Hunt, 7 Ky. Opin. 625.

A sale of real estate by the chancellor under a decree of foreclosure does not pass the title to the homestead, for the reason that the statute expressly exempts it from sale under a judgment; and in a sale under an execution the homestead right does not pass for the reason that the sheriff has no power to sell it.

Queen v. Phillips, 11 Ky. Opin. 363.

The owner of a homestead may sell it and with the proceeds purchase another homestead in good faith, and land including the dwelling-house, not exceeding \$1,000 in value, is exempt from coercive sale.

Carter Bros. Co. v. Liles, 12 Ky. Opin. 456.

Where a homestead right is adjudged and set apart as such, a creditor can not be held to be injured by the sale of such homestead by one having a right to sell it.

Wilcox v. Parker, 12 Ky. Opin. 727.

§ 115. Mortgage.

If, when a mortgage is executed, the homestead is unincumbered, the mortgagee acquires a first lien on it.

Ball & Brough v. Turner, 9 Ky. Opin. 679.

Where a homestead is not waived by a first mortgage on real estate the mortgagor may by a second mortgage waive such right, and the second mortgagee will thereby become the owner thereof.

Hoosier v. Smith, 10 Ky. Opin. 611.

A mortgage which purports to convey the whole estate in the mortgaged property destroys the homestead,

whether the fee be in the wife or in the husband.

Sutton v. Puckett, 11 Ky. Opin. 89.

§ 118. Joinder of husband and wife in deed or mortgage.

Where the wife merely relinquishes her right of dower, it does not pass the homestead, but where the husband and wife convey the whole estate, whether in the nature of a mortgage or by an absolute deed, without limitation as to the rights of either, the homestead passes.

Vaughn v. Owsley, 11 Ky. Opin. 222.

One is not entitled to a homestead in land which he and his wife have mortgaged, where by the terms of the mortgage the homestead was conveyed, and the mortgage has been foreclosed, and the property sold and in possession of the purchaser.

Boyer v. Lincoln, 11 Ky. Opin. 437.

III. RIGHTS OF SURVIVING HUSBAND, WIFE, CHILDREN, OR HEIRS.

§ 140. Rights of surviving husband.

Under the statute, the fee being vested in the wife and the latter entitled to a homestead in the land as against any liability she or her husband might incur, the right to the homestead passed to the husband on the death of the wife for the benefit of himself and children.

Gavin v. Sanders, 12 Ky. Opin. 280.

Where a married woman owns real estate, and its sale on mortgage foreclosure brings a sum in excess of the mortgage and the owner directs that the whole of the land be sold instead of a part only and dies before the excess is paid over, it will pass to her surviving husband, and can not be claimed as a homestead for minor children.

Smith's Admx. v. Smith's Admr., 12 Ky. Opin. 729.

§ 141. Rights of surviving wife.

At the death of the husband the right to the homestead passes to the widow, with the right of the infant children to occupy it jointly with her; but where the widow accepts the pro-

visions of the husband's will devising to her his estate she waives the right to a homestead and in that condition the children can have none.

Elmore v. Elmore's Admr., 11 Ky. Opin. 902.

Where it is not shown in a proceeding to subject property to pay a creditor that the property is of greater value than the homestead interest of the wife and children, although it be conceded that the land was paid for with money belonging to the husband, where the liability was incurred subsequent to the purchase of the land by the husband the homestead right exists notwithstanding the conveyance to the wife may have been fraudulent and void.

Byers v. Prewitt, 12 Ky. Opin. 160.

§ 142. Rights of children or heirs.

After the death of the father and mother, their infant children are entitled to the homestead occupied by their parents, or to a thousand dollars out of the proceeds thereof.

Dillard v. Hunt, 7 Ky. Opin. 625.

The judgment of sale, the confirmation, deed and distribution of the money do not estop or preclude the infant children of a husband from claiming a homestead in his real estate.

Lawrence v. Lawrence's Admr., 10 Ky. Opin. 353.

Where several children are entitled to a homestead, a creditor can not complain because those arriving at twenty-one years of age remain on the homestead with a younger child.

Lawrence v. Lawrence's Admr., 10 Ky. Opin. 353.

Upon the death of the owner and holder, a homestead descends to his heirs, but this interest may be sold when necessary to pay debts, and the proceeds of the sale of a homestead constitute a part of the estate.

Russell v. Russell's Assignees, 10 Ky. Opin. 470.

IV. ABANDONMENT, WAIVER, OR FORFEITURE.

§ 154. Loss or relinquishment of right in general.

Where a debtor or his wife do not

make a claim to property as a homestead they waive such right; and when the right is thus waived the creditors have a right to subject the property to the payment of their claims.

Page v. Coakley's Exr., 13 Ky. Opin. 735.

§ 156. Separation of family.

Where a husband abandons his family, leaving them in possession of the homestead, it is evidence of an intention on his part not to surrender his homestead.

Warren v. Block, 10 Ky. Opin. 659.

§ 160. Removal from homestead.

§ 161.—In general.

The right of a judgment debtor to a homestead only continues so long as he occupies or resides on the premises, and when he has moved from the premises and to another state he can not claim such exemption.

English's Guardian v. English, 8 Ky. Opin. 820.

Occupancy is necessary to entitle the debtor to a homestead exemption and the act of the husband in removing from the premises and establishing his home elsewhere is an abandonment of the homestead exemption.

Jones v. Williams, 10 Ky. Opin. 162.

One who surrenders his home for sale, removes therefrom, and for two years thereafter is not occupying the premises as a home, must be held to have abandoned the same, and he can not thereafter assert a homestead claim thereon.

Ireland v. Pugh, 10 Ky. Opin. 231.

Where the owner of real estate removes from the land without any intention to return to reside on it, she thereby abandons her right to claim a homestead exemption therein.

Frances v. Adams, 10 Ky. Opin. 414.

One who disposes of his property and removes therefrom, leaving without at the time having any present certain and actual purpose of using it as a homestead will be held to have abandoned the homestead and can not

again as against the claim of creditors assert a right under it.

Hall v. McGlothlin, 13 Ky. Opin. 312.

If one removes permanently from his homestead, or if he removes to another state with his family and engages in business there still claiming that he intends to return to this state, he waives his homestead right here and can not thereafter claim such exemption.

Crush & Fleckenstein v. Stewart, 13 Ky. Opin. 1130.

§ 162.—Intent to return.

Mere absence for business purposes temporarily from home, where the homesteader leaves his furniture in the house and leaves a person in charge, is not a change of residence that deprives one of a homestead exemption.

McIlvaine & Speigel v. Stone, 9 Ky. Opin. 890.

Where the intention to return to a homestead at some future time will protect it from creditors, the intention must be made definite and certain and it must be a continuing one; and when it once ceases there is an abandonment, and no resumption of the intention will reclaim the right to the homestead.

White & Co. v. Wilder, 10 Ky. Opin. 836.

An unconditional written surrender signed by the appellee and the mortgagee of the house and grounds to be sold to satisfy appellants' executions, and a removal from the premises without any reason, inconsistent with the presumption of an intention to abandon the homestead by removal and the protracted residence elsewhere, all go to show abandonment of such claims, and will outweigh any secret intention to return which he may have had.

Ireland v. Pugh, 12 Ky. Opin. 49.

Temporary removal from a homestead with a purpose to return to it will not waive the right to a homestead as against creditors.

Herferth v. Zimmerman, 13 Ky. Opin. 992.

§ 163.—Acts constituting abandonment.

The statute requires the court to set apart the homestead to the husband, and not to the wife; and the husband does not forfeit his right by surrendering possession in obedience to an erroneous judgment which was afterwards reversed.

Phillips v. Young, 9 Ky. Opin. 624.

One who has a homestead in Kentucky but leases the place for two years and goes to another state and with his family keeps house there and goes into business abandons his right to claim a homestead in Kentucky and his statement that he intends to return to Kentucky will not be sufficient to defeat a creditor seeking to subject the Kentucky homestead to his claims.

Williams v. Rose, 13 Ky. Opin. 168.

§ 167. Sale and conveyance.

Where a wife joins her husband in a deed absolute on its face, but which is in fact a mortgage, she releases her dower, but such an instrument will not be a waiver of the homestead.

Ricketts v. Rappatto, 9 Ky. Opin. 370.

One entitled to claim a homestead exemption may sell such right and such sale is not in fraud of creditors, for they have no interest in it and can not sell it to satisfy their claims; so long as the debtor lives his homestead is freed from creditor's claims.

Madden v. Crundy's Trustee, 10 Ky. Opin. 23.

When a husband and wife join in a conveyance of the whole estate without limitation either in the deed or certificate of acknowledgment, the same amounts to a waiver of the homestead right.

Benton v. Lemmerick, 10 Ky. Opin. 146.

Where one sells his house and lot on time payments and purchases another house and lot and pays for it by transferring a stock of dry goods, but bought it after becoming indebted, the transaction is not an exchange of one exempt piece of property for another so as to cause the exemption in the

first to attach to the last, as the sale of the first property operated to destroy the homestead, and exemption did not attach to the dwelling afterward purchased.

Faucett v. Hearn, Lee & Pinkard, 10 Ky. Opin. 461.

A homestead right may be waived by a conveyance by husband and wife purporting to convey the whole estate and which contains no limitation either in the deed or in the certificate of the feme's acknowledgment; but if it appears either in the deed or in the certificate of acknowledgment that the wife only released her dower it will not be a waiver of the homestead.

Henry's Exr. v. Robertson, 13 Ky. Opin. 683.

§ 169. Power to waive.

A homestead exemption can not be waived, except by a writing subscribed by both the husband and wife and duly acknowledged and recorded, but without being waived the right terminates whenever the debtor ceases to be a housekeeper, or voluntarily removes permanently from the premises.

Mudd v. Clements, 12 Ky. Opin. 368.

A homestead exemption can only be waived by a writing subscribed by the claimant and his wife, and acknowledged and recorded in the same manner as the conveyance of real estate.

Braun v. Fogle, 12 Ky. Opin. 432.

The waiver of the right of homestead as to one creditor in the manner provided by the statute is not a waiver as to any other creditor.

Schmidt v. Oliges, 12 Ky. Opin. 753.

§ 170. Contracts waiving right in general.

The sale of a homestead and the appropriation of the proceeds to the purchase of other property, not exempt from seizure and sale for debt, or to a permanent interest-bearing investment, will be deemed and treated as a voluntary waiver of the benefit of the homestead exemption.

Rose & Bro. v. Cookendolpher, 9 Ky. Opin. 815.

A deed or mortgage which purports to convey the whole estate in land, in which the wife unites as a grantor, will, when legally acknowledged by the husband and wife and recorded, be a valid waiver of the homestead exemption in land embraced by such conveyance.

Ames v. Mercer's Admr., 10 Ky. Opin.

Where in a conveyance of a husband's real estate he agrees to relinquish his homestead right and the value of the homestead is credited on the purchase-money, he can not thereafter assert a homestead claim as to such real estate.

Whitesides v. Cushenberry, 10 Ky. Opin. 413.

§ 171. Mortgage or other incumbrance as waiver of rights.

A homestead exemption is not waived by the wife merely joining with her husband in a mortgage of his property to relinquish her right of dower.

McIlvaine & Speigel v. Stone, 9 Ky. Opin. 890.

Where a mortgage in terms purports to convey all the interest held by either husband or wife in the land mortgaged, and the mortgage is signed and acknowledged by the husband and wife, the homestead goes in the mortgage as the fee does in a deed, and the right to a homestead is effectually waived.

Gaddie v. Hodges, 12 Ky. Opin. 235.

One, by mortgage, may waive his right to a homestead in the property mortgaged, but when in foreclosure the real estate has to be sold because not such as can be divided, the claimant is entitled to the excess purchase-money for reinvestment in a homestead, and his creditors can not take it from him by alleging that it is his intention not to invest it but to spend it or squander it.

Schmidt v. Oliges, 12 Ky. Opin. 756.

Where the county court clerk made the following certificate: "I, C. W. Thompson, county clerk * * * state

that this day appeared before me Andy J. Robertson and acknowledged the within mortgage, and his wife, being separate and apart from her husband, voluntarily acknowledged the same," it was held that such an act by the wife, duly certified to by the clerk, will effectually waive the claim for homestead.

Henry's Exr. v. Robertson, 13 Ky. Opin. 683.

§ 172. Consent to levy and sale.

The failure to claim a homestead, in a creditor's suit to sell the debtor's land that includes it, does not amount to a waiver of the debtor's right to sue for and recover the land.

Stephens v. Cornelson, 9 Ky. Opin. 811.

One entitled to hold a homestead exempt from execution does not waive his right to such exemption by agreeing to pay rent to the purchaser under execution, where he is coerced into making the lease contract.

Braun v. Fogle, 12 Ky. Opin. 432.

§ 177. Estoppel to claim homestead.

A widow who accepts the provisions of her husband's will can not claim a homestead in his land as against creditors of the estate.

Oschaver v. German Bldg. & Sav. Assn. of Covington, 12 Ky. Opin. 217.

V. PROTECTION AND ENFORCEMENT OF RIGHTS.

§ 182. Establishment of right of exemption in general.

One not a party to a contract, by accepting its benefits and acquiescing in the arrangement for one year at least constructive notice thereof, is estopped to set up any claim to the homestead rights of the husband.

Bates v. Scobee's Assignee, 11 Ky. Opin. 608.

§ 198. Allotment.

§ 199.—Proceedings in general.

A creditor can not subject the homestead to the payment of his claim, so long as it remains a homestead, and the right to it is not waived, and the homestead must be set apart in

the manner pointed out by the statute before making sale.

Trimble v. McGuire, 12 Ky. Opin. 136.

§ 203. Sale of property subject to homestead.

In subjecting land conveyed by the husband and his wife, to payment of the husband's creditors, the homestead should be expressly excepted.

Shanklin v. Shackler, 7 Ky. Opin. 577.

In an execution sale of land, the vendor knows what he is selling and the purchaser knows what he is buying, so the debtor can not be estopped to assert a homestead right where he did not consent to the sale or induce the purchaser to buy.

First Nat. Bank of Louisville v. Carter, 7 Ky. Opin. 486.

There is no remainder in a homestead that can be sold while the debtor is living.

Cole v. Rhor, 10 Ky. Opin. 631.

Where a defendant is entitled to a homestead, the officer holding an execution has no right to sell the property without setting apart the defendant's homestead; and the purchaser at such a sale takes the property subject to the homestead, and as to the extent of its value he acquires no title.

Cole v. Rhor, 10 Ky. Opin. 531.

Where a homestead is held only on a portion of the whole of the land ordered sold, the court should direct the sale of the land not covered by the homestead, before resorting to that portion embraced in the homestead.

McGrath v. Berry, 10 Ky. Opin. 550.

Where the homestead is not waived by a mortgage nor barred by a judgment, the land to be sold should be ordered sold subject to the homestead, and such a judgment having been rendered, its effect can not be enlarged by facts occurring in pais before the sale.

McGrath v. Berry, 10 Ky. Opin. 550.

Creditors may cause the homestead to be sold subject to the right of occupancy by the children until the youngest unmarried becomes twenty-one years old.

Russell v. Russell's Assignees, 10 Ky. Opin. 470.

Where a part of real estate conveyed to defraud creditors consists of a dwelling appraised at \$1,050, the creditor is entitled to have it sold if it can be sold for more than \$1,000 and after the payment of the \$1,000 homestead he is entitled to the excess.

Gaitskill v. Stivers, 12 Ky. Opin. 565.

Where real estate is sold under an execution subject to the homestead right of a defendant, and the holder of the judgment purchases the property at such sale, they must be held to have purchased subject to a homestead right and to have acquired no interest, save whatever might remain after the allowance of the exemption.

Crush & Fleckenstein v. Stewart, 13 Ky. Opin. 1130.

§ 208. Actions and defenses.

§ 213.—Pleading.

A petition of a married woman, not showing that she and her husband were occupants and owners of the house and lot and housekeepers with a family prior to the creation of the debt for which the property was subjected, fails to state a cause of action on a claim of a homestead exemption.

Spray v. Wright, 10 Ky. Opin. 634.

§ 214.—Evidence.

The law presumes that the sheriff, in setting aside a defendant's homestead as an exemption, did his duty, and the burden is on one charging failure of duty to establish such charge.

Belknap & Co. v. Robinson, 8 Ky. Opin. 283.

§ 217.—Judgment and enforcement thereof.

Where no reply is filed to a defendant's plea alleging facts showing that he is entitled to a homestead in land sought to be subjected to debts, it is the duty of the court to treat the allegations in such a pleading as true

and enter judgment accordingly; but it is error not to adjudge that the remainder of the property not covered by the homestead was subject to the plaintiff's lien.

Santa v. Grant, 12 Ky. Opin. 89.

HOMICIDE.

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Assault with deadly weapon, see Assault and Battery, § 56.

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I. THE HOMICIDE.**§ 2. Nature of act or omission causing death.**

Every person is held to contemplate and to be responsible for the natural consequences of his own acts, but where a wound inflicted is not dangerous in itself, and death results from improper treatment or from disease subsequently contracted, not superinduced by or resulting from the wound,

the accused is not punishable for homicide.

Anderson v. Commonwealth, 10 Ky. Opin. 439.

§ 5. Cause of death.

Where a wound is calculated to cause death, and a surgical operation is performed at the instance of competent physicians, when in their opinion it becomes necessary, and the patient dies, the party inflicting the wound is liable criminally for the act although the operation may have been the immediate cause of death.

Osborn v. Commonwealth, 12 Ky. Opin. 649.

II. MURDER.

§ 7. Nature and elements in general.

An intentional killing does not necessarily imply the crime of murder, since a killing in self-defense, for instance, would be an intentional killing, and yet not wrongful in the eye of the law, and a predetermination to do a wrongful act without lawful excuse, is not, of necessity, that malice aforethought which is an essential element in the crime of murder.

Frazier v. Commonwealth, 10 Ky. Opin. 133.

§ 10. Malice.

Malice is not an implication of law, but a matter of fact to be determined in a homicide case by the jury, as any other element in the crime of murder, and it is not required that the court should single it out from the other facts, and in an instruction give undue prominence to it.

Farris v. Commonwealth, 10 Ky. Opin. 309.

§ 13.—Implied.

If one kills another without cause, the law implies malice; but malice can not be implied from every deliberate, cruel act committed by one person against another, for if the killing is in sudden heat and passion, the crime is manslaughter and not murder; and no malice can be implied where the killing, though intended, was done in sudden heat of passion.

Maxey v. Commonwealth, 8 Ky. Opin. 251.

Whether malice in a homicide case may be implied by law from a deliberate, cruel act, depends upon whether the deliberate and cruel act is unlawful and of such a deliberate and cruel nature as to indicate a previous determination to commit the offense charged; since an act may have been deliberate and cruel even unto killing, and be excusable by reason of having been done in the necessary self-defense of the accused.

Wright v. Commonwealth, 9 Ky. Opin. 929.

§ 21. Degrees.

The offense of malicious stabbing with intent to kill is not a degree of homicide, but all kind of offenses where the death of a human being results are degrees of homicide.

Hammonds v. Commonwealth, 8 Ky. Opin. 796.

§ 28. Intoxication.

It is no defense for an accused in a murder case to show that he was badly intoxicated at the time of the killing, as voluntary intoxication will not excuse one in committing crime.

Finley v. Commonwealth, 13 Ky. Opin. 122.

§ 30. Principals and accessories.

Where three persons are jointly indicted for murder, and in the separate trial of one it is shown that he was present at the killing, and called on one of the others to kill the deceased, and struck him himself, even though the blow of the other perhaps was fatal, he is guilty as a principal and the court correctly refused to instruct the jury that the guilt or innocence of the defendant was to be determined by that of the other who struck the fatal blow.

Dudley v. Commonwealth, 8 Ky. Opin. 356.

Where a person with malice aforethought and with purpose to kill deceased, aided and abetted, such person is guilty of murder as principal, whether his conduct resulted in the death of the deceased or merely aided in such result.

Hammonds v. Commonwealth, 8 Ky. Opin. 796.

III. MANSLAUGHTER.

§ 33. Elements of voluntary manslaughter.

One who recklessly fires a pistol in a crowded room, and thereby kills another is guilty of manslaughter, the law presuming his intention to kill from such reckless conduct.

Walls v. Commonwealth, 12 Ky. Opin. 687.

§ 34. Elements of involuntary manslaughter.

Involuntary manslaughter is the killing of another in doing some unlawful act, but without an intention to kill, and it may be either when the act is directed against the person killed or against another person or thing and kills one not intended to be hurt.

Quinn v. Commonwealth, 12 Ky. Opin. 343.

§ 38. Sudden passion or heat of passion.

§ 39.—In general.

Where two principals in the killing of a person both wounded the deceased with their knives, by cutting him in sudden heat and passion, both are guilty of manslaughter, and the offense of malicious stabbing with intent to kill was merged in the higher offense of murder or manslaughter.

Hammonds v. Commonwealth, 8 Ky. Opin. 796.

One in a fight who unlawfully stabs his adversary in sudden heat and passion is guilty of manslaughter, and not murder, if his adversary dies as the result of being thus stabbed, and it does not matter that the attack was voluntary.

Bowman v. Commonwealth, 9 Ky. Opin. 924.

It is error in a murder case for the court to charge the jury, in effect, that in order to reduce the offense from murder to manslaughter the accused must have committed the act under the influence of passion aroused by some act on the part of the deceased which was likely to excite violence and uncontrollable anger in the accused; since it is not required in order to reduce murder to manslaughter that the killing should have been done

under the influence of uncontrollable passion aroused by an act likely to create anger.

Robinson v. Commonwealth, 9 Ky. Opin. 926.

§ 41. Provocation.

If one provokes a combat, or produces the occasion, in order to have a pretext for killing his adversary or doing him great bodily harm, the killing will be murder, no matter to what extremity he may have been reduced in the combat; but if he provokes the combat or produced the occasion without any felonious intent, intending an ordinary battery merely, the final killing in self-defense will be manslaughter only, and not murder.

Jenkins v. Commonwealth, 10 Ky. Opin. 76.

§ 61. Homicide in commission of or attempt to commit other offense.

§ 62.—In general.

Where one is killed by another, and the killing is the result of and occasion by lawless and reckless handling of a pistol by the defendant, his offense is manslaughter, especially when it is shown that while under the influence of whisky he is threatening harm to another, and in recklessly flourishing his pistol and during the effort of friends to restrain him he shot and killed the deceased, without intending to do so, while intending to kill the other fellow.

Ellison v. Commonwealth, 12 Ky. Opin. 665.

§ 69. Homicide in undue exercise of authority or duty.

§ 72.—Making arrest or preventing escape of prisoner.

The fact that a warrant in the hands of a constable was defective does not reduce the offense from murder to manslaughter, where the constable was acting in good faith and using no more force than necessary in attempting to make the arrest.

Alsop v. Commonwealth, 11 Ky. Opin. 851.

§ 74. Negligence in performance of lawful act.

Before a man deals with a gun or pistol as if it were not charged, it is incumbent upon him to ascertain

whether it is so or not, and if he does not use reasonable caution in this respect, and afterwards upon pulling the trigger it unexpectedly explodes and kills a person, it will be manslaughter.

Barnard v. Commonwealth, 8 Ky. Opin. 764.

§ 83. Principals and accessories.

One who is merely present and is passive and neither aids nor abets, advises or encourages the killing is not guilty of murder, but one who maliciously aids, advises and encourages the killing at the time of the shooting or with malice confederates with the party shooting and is present for the purpose of committing the offense, and the person shot is killed, the party so aiding or abetting, or who has so confederated with another to take the life of the deceased and is present at the time of the killing, is as much guilty of murder as if he had fired the fatal shot and may be indicted as principal.

Smith v. Commonwealth, 11 Ky. Opin. 774.

IV. ASSAULT WITH INTENT TO KILL.

§ 93. Defenses.

§ 94.—In general.

Where one being present engaged in the strife that resulted in the death of a party, although he had the right to interfere to preserve the peace and to protect his relative from the assault of the deceased, he had no right to use more force than was reasonably necessary for that purpose.

Raske v. Commonwealth, 10 Ky. Opin. 964.

§ 96.—Self-defense.

Where, after an altercation, the deceased went away and was entirely out of danger, and then voluntarily returned with the avowed purpose of renewing the fight, and in attempting to carry out such purpose lost his life by being shot by the accused, the accused's right of self-defense was as perfect as if he had not fired at the deceased in the former encounter; where he was at his home, and was not bound to retreat, and if he believed and had reasonable ground to believe

that if he stood his ground the deceased would take his life or do him serious bodily harm, he had a right to shoot, and is excusable on the ground of self-defense and apparent necessity.

Skaggs v. Commonwealth, 10 Ky. Opin. 504.

§ 97.—Defense of another.

If at the time a defendant stabs another he had reasonable ground to believe and did believe that the deceased was about to kill another or do him great bodily injury, such defendant had a right to employ such means as may have been reasonably necessary to avert the apparently impending danger; and whatever one may lawfully do in his own defense another may lawfully do for him.

Smith v. Commonwealth, 9 Ky. Opin. 363.

V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

§ 108. Self-defense.

§ 109.—In general.

In order to justify a killing on the grounds of self-defense, the person assailed must actually believe or be convinced that he is in danger, but he is not bound to have more than reasonable grounds to base his belief or conviction on.

Price & Mattis v. Commonwealth, 11 Ky. Opin. 888.

In a criminal case, if there is any evidence tending to show that accused was defending himself or property when he killed the deceased, the accused is entitled to an affirmative instruction upon the hypothesis of self-defense and apparent necessity.

Sparks v. Commonwealth, 13 Ky. Opin. 484.

§ 111.—Resistance of arrest.

While, in an attempt to arrest a person for a public offense, the officer or private person may not in every respect comply with the strict letter of the law, still the person arrested or attempted to be arrested has no right to take life, except to protect his own life or himself from great bodily harm.

Bowling v. Commonwealth, 13 Ky. Opin. 1110.

§ 116.—Apprehension of danger.

If the defendant and the deceased met without design or contrivance on the part of defendant, he would not necessarily be guilty because he commenced the conflict; but if they met otherwise than by design of the defendant, and he found himself in apparent danger without any fault on his part at the time, his right of self-defense was unaffected by any previous altercation.

Botts v. Commonwealth, 8 Ky. Opin. 37.

Under the defense of self-defense in a murder charge, the rule is that when one believes and has reasonable ground to believe that he is in danger of immediately losing his life, or of sustaining great bodily injury at the hands of another, he has a right to do whatever is apparently necessary for his own security; but he must act rationally, in view of all the facts and circumstances, however if these are such that there is no other apparent safe means of escaping the danger, he may legally slay his adversary.

Kramer v. Commonwealth, 8 Ky. Opin. 428.

Where an altercation took place on defendant's premises, the defendant had the right to require the deceased to leave the premises, and on his refusal, to use such means as were necessary to make him leave, and if the deceased assaulted the defendant with a deadly weapon, or for the purpose of taking his life or inflicting great bodily harm, the defendant had the right to defend himself, and for this purpose to use such force as was necessary, or apparent to him to be necessary, to avoid the danger, and if in so doing he killed his adversary it is self-defense.

Moore v. Commonwealth, 9 Ky. Opin. 789.

To excuse a person who takes the life of another upon the ground of self-defense, the accused must have believed and had reasonable grounds to believe that he was at the time in imminent danger of great bodily harm or loss of life at the hands of the per-

son slain and that he had not other apparently safe means.

Morris v. Commonwealth, 13 Ky. Opin. 87.

§ 117.—Necessity of act in general.

A party to an altercation has a right to act upon appearances as they seem to him in defending himself, but he must act reasonably and upon reasonable grounds, and he must believe that he is in danger, and he must have reasonable grounds for so believing, and he must judge reasonably and the jury have a right to determine whether he has done so.

Palmer v. Commonwealth, 13 Ky. Opin. 68.

§ 118.—Duty to retreat.

If one is assaulted with deadly weapons in such manner as reasonably appears to endanger his life or to inflict on him great bodily harm, he is not bound to retreat but may lawfully defend himself by using such means as are necessary or reasonably appear to be necessary to protect himself against the assailant, where he did not first assault the deceased nor bring on the difficulty.

Little v. Commonwealth, 13 Ky. Opin. 869.

§ 122. Defense of another.

Where the defense in a murder case is that the accused shot in order to prevent the deceased from killing his brother, and the proof shows that the accused and his brother were both in a fight with the deceased and that the brother struck the first blow, the accused can not complain of an instruction to the effect that if the accused killed the deceased by shooting him when it was not necessary and did not reasonably appear to him to be necessary to protect himself or brother from great bodily harm then threatening them or one of them, they must find him guilty.

Sopher v. Commonwealth, 9 Ky. Opin. 106.

One may legally take the life of another to protect a relative or a stranger, or, if from his viewpoint and the circumstances existing it appeared to him to be necessary to do so, and an instruction from which the jury may

get the idea that one may not legally take life to save a stranger's life or to save such stranger from danger of great bodily harm, is erroneous.

Roberts v. Commonwealth, 9 Ky. Opin. 198.

One may lawfully do in the defense of the person of another all that he might lawfully do if the danger threatening or apparently threatening that other were threatening or apparently threatening himself.

Robinson v. Commonwealth, 9 Ky. Opin. 926.

§ 125. Accident or misfortune.

One who kills another without malice and with no intention to kill by snapping a pistol and pointing it at another believing it not to be loaded, is not guilty if he has used such diligence as an ordinarily prudent person would have deemed necessary to satisfy himself that the pistol was not loaded, and did in fact believe it was not loaded.

Barnard v. Commonwealth, 8 Ky. Opin. 764.

VI. INDICTMENT AND INFORMATION.

§ 127. Requisites and sufficiency in general.

An indictment substantially in the language of the statute is generally, though not always, sufficient; and where it is charged that the defendant did, on the 3d day of December, 1875, in the county of Barren, unlawfully shoot at E. B. Dearing with a pistol and with intention to kill said Dearing, but did not wound said Dearing, it is sufficient.

Commonwealth v. Crumpton, 9 Ky. Opin. 614.

An indictment is good which charges that the defendant "did wilfully, feloniously, and of his own malice aforethought, kill and murder his mother, Mrs. Stewart, by hitting her with a rock."

Stewart v. Commonwealth, 9 Ky. Opin. 793.

An indictment is sufficient which alleges that the accused did unlaw-

fully shoot and wound a named person with an intention to kill him.

Owens v. Commonwealth, 10 Ky. Opin. 659.

In an indictment for homicide, the fact that the deceased was an officer acting in the discharge of his duty when he was killed need not be alleged.

Alsop v. Commonwealth, 11 Ky. Opin. 851.

§ 129. Malice.

A person indicted for homicide is not entitled to be informed by the indictment of the quality or quantity of the evidence relied on to prove his malice.

Alsop v. Commonwealth, 11 Ky. Opin. 851.

In an indictment for homicide it is not essential that the evidence relied on to fix the malice alleged should be set forth.

Alsop v. Commonwealth, 11 Ky. Opin. 851.

§ 133. Time of offense.

Time is not a material ingredient of the offense of manslaughter, and an indictment is not bad when it charges that the offense was committed on the — day of —, 188—, for by such charge it is shown that the offense was committed before the return of the indictment. Especially is this shown by the use of the terms "did feloniously * * * kill," etc.

Price & Matthis v. Commonwealth, 11 Ky. Opin. 888.

§ 135. Means or instrument, and manner of use thereof.

Generally an indictment for a statutory offense is sufficient if it be in the words of the statute, but this is not always true, since in charging one with unlawfully shooting at another with intent to kill or wound it is not sufficient to merely allege that the accused shot at another with intent to kill, for the fact of shooting at another does not necessarily imply the use of a weapon sufficient to kill or wound, because it may be done with an instrument totally insufficient and under circumstances showing no criminal intent, and in such an indict-

ment it must be alleged that the weapon used was a deadly weapon.

Commonwealth v. McElroy, 11 Ky. Opin. 242.

VII. EVIDENCE.

(A) PRESUMPTIONS AND BURDEN OF PROOF.

§ 144. Elements of offense in general.

The facts necessary to show prima facie the guilt of an accused person are required to be proved beyond a reasonable doubt, but facts which go to excuse the killing, in a murder, or to mitigate the offense, need not be so proven, but it is sufficient if on the evidence the jury entertain a reasonable doubt whether or not matters of excuse or in mitigation have been established.

Roberts v. Commonwealth, 9 Ky. Opin. 198.

§ 146. Malice.

Malice in a murder case must be proven like any other ingredient of the offense of murder, and it is for the jury to say whether from the facts or a fair inference therefrom it existed in the bosom of the party taking the life of his fellowman, and whether life is taken with malice or in the absence of malice and in sudden heat and passion is with the jury and not the court.

Chambers v. Commonwealth, 13 Ky. Opin. 149.

§ 151. Excuse or justification.

Where, in a prosecution for homicide the commonwealth has shown the killing on the part of the accused without mitigating circumstances or excuses, the burden is on the party charged to show justification in order to entitle him to acquittal.

Moore v. Commonwealth, 7 Ky. Opin. 218.

(B) ADMISSIBILITY IN GENERAL.

§ 154. Identity of deceased.

It is impossible to always prove by direct testimony the identity of a person or object, and witnesses in identifying a corpse are allowed to express their beliefs or give their opinions as

to such identity, or even to deduce inferences respecting the fact in question from other facts, provided these facts are within their personal knowledge.

Shuck v. Commonwealth, 9 Ky. Opin. 440.

§ 155. Intent, malice, deliberation and premeditation.

§ 156.—In general.

In a charge of murder the coolness and deliberation with which the slayer acted may furnish strong evidence that his act was prompted by malice and was not caused by sudden heat of passion excited by provocation, but the inference to be drawn from his coolness and deliberation under provocation is one of fact for the jury, and they should be left to make it or not as their own judgments may dictate, free from any direction of the court.

Jenkins v. Commonwealth, 10 Ky. Opin. 76.

§ 158.—Previous threats and expressions of ill will by accused.

Where no difficulty had occurred between the accused and the person killed, and no threat or demonstration of anger had been made by the accused toward any one, it was error to admit evidence of a witness that on the day of the killing the defendant had said, "That he could shoot a man just to see him kick," where the witness said that the words were spoken in a jocular manner and no reference to the accused or any one else, and the accused was in a good humor and laughing at the time.

Greenwade v. Commonwealth, 10 Ky. Opin. 127.

In the trial of one charged with murder, evidence is admissible showing threats, menaces, assaults, lying in wait, carrying arms, the character of the deceased for lawlessness or violence, the circumstances of the meeting and other facts showing that the slayer was in peril at the time of the killing, or that he had reasonable grounds for believing he was in peril, for the purpose of showing that there was grounds for believing he was then in danger.

Brown v. Commonwealth, 10 Ky. Opin. 375.

§ 163. Character and habits of parties.

When in a murder trial it appears that a short time before the killing the deceased had been placed under bond on application of defendant, to keep the peace and be of good behavior toward defendant, the record of such proceeding is admissible to show the tendency of defendant to resort to the law rather than to violence and because it served to illustrate the character of deceased.

Kramer v. Commonwealth, 8 Ky. Opin. 428.

§ 164. Physical condition of parties.

In a charge of murder, where self-defense is relied upon, evidence of bruises on the defendant shortly after the offense is committed, is admissible.

Kramer v. Commonwealth, 8 Ky. Opin. 428.

A defendant in a charge of homicide, asserting self-defense, should be permitted to prove the state of his clothing and the bruised condition of his face on the evening succeeding the affray.

Wainescott v. Commonwealth, 8 Ky. Opin. 639.

§ 167. Threats, preparations, and previous attempts.

It was not error to refuse to admit proof that immediately after defendant stabbed the deceased and had himself been shot, that other parties proposed to go into the room where defendant was, "and if he was not dead to finish him;" for a conspiracy by others to kill defendant after he had fatally stabbed the deceased would not tend to justify the killing, since it could not be material so far as appellant was concerned whether such conspiracy then existed or not.

Botts v. Commonwealth, 8 Ky. Opin. 37.

In a charge of murder, where threats have been made by the deceased against the life of the defendant, and some of them communicated to defendant, all are admissible as evidence.

Kramer v. Commonwealth, 8 Ky. Opin. 428.

It is not error to refuse to allow the defendant in a criminal case to prove threats upon his life made by the deceased, where there is no offer to prove that such threats were communicated to defendant before the killing.

Shipp v. Commonwealth, 8 Ky. Opin. 652.

In a homicide case threats said to have been made by the deceased to kill the accused are not admissible in evidence, when it is not shown that they were communicated to the accused prior to the killing.

Shackelford v. Commonwealth, 12 Ky. Opin. 266.

It is not allowable in a murder trial to prove threats made by the deceased ten or twelve days before the killing, by way of proving the action and conduct of the deceased, where such threats were not communicated to the defendant until after the killing.

Letcher v. Commonwealth, 13 Ky. Opin. 1.

§ 169. Circumstances preceding act.

It is error in the trial of a murder case to admit evidence of proceedings which occurred away from the place where the homicide took place, between one person and the deceased, in which the deceased abused such person, the defendant not being present and having no knowledge of what occurred there.

Sewell v. Commonwealth, 11 Ky. Opin. 213.

A warrant addressed to the chief of police of a city and sent by the chief of police to a constable of a township, with a letter directing the constable to arrest the defendant, was admissible in evidence in the prosecution of the defendant for killing the constable while attempting to arrest defendant, where defendant knew that the deceased was a constable.

Alsop v. Commonwealth, 11 Ky. Opin. 851.

Where in a homicide case the evidence tends to show that the defendant did the killing in self-defense, a statement of defendant's wife to a witness to the effect that the witness

should go away, that the appellant had gone after his pistol, made a moment before the killing, which took place in the highway just outside of the house, and the wife's statement was not made in the presence or hearing of either the deceased or defendant, such a statement is hearsay and not admissible.

Huffman v. Commonwealth, 13 Ky. Opin. 14.

It is error for the trial court in a homicide case to refuse to permit a declaration of the deceased, made a short time before he advanced to the store house of the accused, to go to the jury where the declaration accompanied with an oath was that he was going to take the town of Lilly; for, while the threat in terms was not directed at the accused, there can be no doubt he meant them or one of them, especially, since his friend had just returned from the store of the accused and reported to decedent that "he had housed Lilly," and it is clear the declaration excluded had direct reference to the accused.

Sparks v. Commonwealth, 13 Ky. Opin. 484.

§ 171. Nature of act and attendant circumstances in general.

Where the commonwealth, in a trial of one charged with murder, proves a statement made by the accused to the officer arresting him, in the nature of an admission, it is reversible error for the court to sustain an objection made by the state to evidence, showing the whole of the conversation between the accused and the arresting officer, and when one part of a conversation is introduced to show a confession of the crime the defendant has the right to have the whole of what was said in the conversation laid before the jury.

Mullins v. Commonwealth, 11 Ky. Opin. 527.

§ 172. Commission or attempt to commit other offense or unlawful act.

When an accused is on trial for murder, an indictment against him for carrying concealed a deadly weapon is not admissible in evidence against

him, and even if it were competent evidence for any purpose it should have been proved by the record and not by verbal testimony.

Shipp v. Commonwealth, 9 Ky. Opin. 463.

§ 180. Intoxication.

Drunkenness may be proved in a murder case to rebut proof or inference of malice, but for no other purpose; and where one charged with murder is convicted only of manslaughter, an offense of which malice is not an ingredient, he is not prejudiced by the refusal of the court to instruct on that subject.

Robinson v. Commonwealth, 10 Ky. Opin. 109.

§ 186. Self-defense.

§ 187.—In general.

Evidence in a case where the defendant is accused of shooting with intent to kill, and is seeking to defend on the ground of self-defense, is inadmissible on behalf of the state, when such evidence tends only to show what might appear to the jury to be reasonable belief of great bodily danger instead of what should appear reasonable belief of danger on the part of the accused, since in such a case it is not an inquiry as to what the danger actually was, but what, under the circumstances, it appeared to be to the accused.

May v. Commonwealth, 11 Ky. Opin. 396.

If the accused did the shooting under circumstances from which he had reasonable grounds to believe and did believe that he was in danger of losing his life or of suffering great bodily harm at the hands of the person shot, the accused is justified and acted in self-defense.

May v. Commonwealth, 11 Ky. Opin. 396.

§ 196. Defense of another.

What a man in peril of his life or great personal injury may lawfully do in his own self-defense, another person may lawfully do for him.

Deskins v. Commonwealth, 10 Ky. Opin. 350.

(C) DYING DECLARATIONS.

§ 201. Condition of person making declaration.

§ 203.—Sense of impending death.

To be admissible as evidence dying declarations must be made under a sense of impending death, and there must be an impression of almost immediate dissolution.

Wainscott v. Commonwealth, 8 Ky. Opin. 639.

Where the attending physician of one who has been shot after examination states to his patient that his recovery is impossible and the physician then believes that the patient has himself no hope of recovering at the time he made a declaration as to who shot him, such dying declaration is admissible in evidence.

McGee v. Commonwealth, 10 Ky. Opin. 84.

It is incumbent on the prosecution in a murder trial not only to show that a declaration offered in evidence was made in the view of approaching death, but the facts stated in such declaration must have such relation to the act of killing as renders them admissible in evidence, and where other evidence introduced by the prosecution shows that there was a considerable interval between the facts first stated and the fatal meeting, the part of the declaration pertaining to the facts first stated should be rejected.

Drake v. Commonwealth, 10 Ky. Opin. 381.

A declaration, made by one suffering from an injury after he is informed by the surgeon, that he can only live a short time, he believing what is told him, is admissible as a dying declaration against one accused of his murder.

Drake v. Commonwealth, 10 Ky. Opin. 381.

A declaration made by a wounded person within a half of an hour after being wounded and more than forty days before he died, preceded by his statement that "he had fears that he would not recover from his wound and that he desired to make a statement, so as no false impression should

go out in regard to the matter," is admissible as a dying declaration, since the statement shows that the deceased was under the belief that his wound would prove fatal.

Mackey v. Commonwealth, 11 Ky. Opin. 209.

§ 205. Circumstances attendant on making of declaration.

The fact that deceased was not advised by his physician as to his condition, and did not seek spiritual comfort, does not destroy the effect of his dying declarations, where they were made under a sense of impending death.

Moore v. Commonwealth, 7 Ky. Opin. 218.

§ 206. Making and form of declaration.

A written statement made out and signed by parties other than the deceased when not shown to have been read to the deceased and adopted by him as his version of the tragedy, is not competent as a dying declaration.

Babbitt v. Commonwealth, 5 Ky. Opin. 522.

§ 209.—Written declarations.

Where a dying declaration reduced to writing is held inadmissible as evidence, it does not follow that a parol dying declaration is not admissible; and when a written declaration is excluded on motion of the accused in a murder trial the ruling will not prevent parol dying declarations otherwise admissible from being admitted as evidence against the accused.

McGee v. Commonwealth, 10 Ky. Opin. 84.

The law does not require dying declarations to be reduced to writing, and where they are written they are not required to be attested. Oral declarations may be admissible in evidence.

Drake v. Commonwealth, 10 Ky. Opin. 381.

§ 215. Competency of declaration as evidence.

If dying declarations are admitted in evidence, their credibility is a question for the jury.

Moore v. Commonwealth, 7 Ky. Opin. 218.

In order to make a dying declaration admissible, the deceased must have believed, at the time it was made, that he was at the point of death, and must have been without hope or expectation of recovery.

Proctor v. Commonwealth, 9 Ky. Opin. 472.

There is no error in allowing a witness to testify orally to the dying statements of deceased after the written statement had been read, where the oral statements were simply an elaboration of what is contained in the writing, and are not contradictory to the writing.

Bailey v. Commonwealth, 11 Ky. Opin. 178.

In order that dying declarations may be introduced by the state against the accused, they should be confined to facts and can not be allowed to extend to mere matters of opinion; but where the declaration is offered by the accused it should be permitted from necessity and for the reason that the deceased is so likely to be telling the truth when he in the presence of approaching death declares himself to have been alone blamable and his slayer excusable.

Haney v. Commonwealth, 12 Ky. Opin. 207.

A dying declaration, which is an expression of the deceased's opinion that the accused was blameless, is admissible in behalf of an accused to explain the intent and motive with which he was actuated in the part he played, and will always aid the jury in understanding the true nature and object of his acts as proved by other witnesses.

Haney v. Commonwealth, 12 Ky. Opin. 207.

While it is the general rule that matters of opinion or belief are excluded as evidence, an exception is made allowing the declarations of the deceased, in a homicide case, in behalf of the accused, where they will explain the acts and conduct of the deceased or show his feelings, motive, intent or belief, when they are essential to qualify or aggravate his conduct.

Haney v. Commonwealth, 12 Ky. Opin. 207.

§ 217. Method of proof.

Dying declarations may be established by oral evidence.

Babbitt v. Commonwealth, 5 Ky. Opin. 522.

(D) PROCEEDINGS AT INQUEST.

§ 222. Admissibility in general.

In the trial of one charged with murder, the minutes made by the acting coroner at the inquest on the body of the person whom the accused is charged with killing, are not admissible in evidence for any purpose.

Brown v. Commonwealth, 13 Ky. Opin. 838.

(E) WEIGHT AND SUFFICIENCY.

§ 244. Self-defense.

One who is the aggressor in a fight and makes an unprovoked attack upon another can not be held to be acting in self-defense when he kills the person attacked in attempting to ward off the blows of the person attacked; since one can not provoke an attack for the purpose of an excuse to take life and then go acquit on the ground that he took life in defense of himself.

Middleton v. Commonwealth, 12 Ky. Opin. 655.

If one charged with murder at the time of the offense had reasonable grounds to believe and did believe that he was in danger of losing his life or of suffering great bodily harm from the deceased, then he had the right to use such means as reasonably appeared to him to be necessary to protect himself from the impending danger.

Stivers v. Commonwealth, 12 Ky. Opin. 657.

VIII. TRIAL.

(A) CONDUCT IN GENERAL.

§ 259. Course of trial in general.

On the trial of a felony case, the indictment is required by Crim. Code (1876), §§ 155, 219, to be twice read, once by the clerk to the defendant, which may be dispensed with by his

consent, and once to the jury by the clerk or commonwealth's attorney.

Galloway v. Commonwealth, 11 Ky. Opin. 951.

(B) QUESTIONS FOR JURY.

§ 268. Questions of law or of fact in general.

Where malice is an essential ingredient in a crime, the jury should be left to find that it exists or does not exist, the same as it is left to them to find the killing in a homicide case.

Banks v. Commonwealth, 10 Ky. Opin. 297.

§ 276. Self-defense.

It was for the jury, and not the court, to determine whether or not, when considered in connection with all the evidence in the case, they justified the conclusion that the accused at the time of the killing believed and had reasonable grounds to believe that he was then in imminent danger of losing his life or suffering great bodily harm at the hands of the deceased.

Carter v. Commonwealth, 5 Ky. Opin. 777.

(C) INSTRUCTIONS.

§ 283. Province of court and jury in general.

An instruction in effect that if deceased assaulted defendant's wife and she screamed the assault and scream constituted reasonable grounds for belief on defendant's part that the deceased was about to inflict on defendant's wife great bodily harm, invades the province of the jury.

Beasley v. Commonwealth, 7 Ky. Opin. 201.

§ 284. Corpus delicti.

In an action for homicide it was held proper to instruct the jury that if they believe from all the evidence in the case, beyond a reasonable doubt, that accused committed the offense, describing it as charged in the indictment, and not in his own necessary self-defense, the verdict should be against the defendant.

Moore v. Commonwealth, 7 Ky. Opin. 218.

§ 285. Elements of offense in general.

By refusing to instruct as to the law of manslaughter the court judiciously determined that the evidence did not authorize the jury even to entertain a reasonable doubt as to the grade of the offense committed.

Carter v. Commonwealth, 5 Ky. Opin. 777.

§ 286. Intent, malice, deliberation, and premeditation.

An instruction as to malice in a prosecution for homicide was held not prejudicial where defendant was convicted of manslaughter in which the element of malice was not involved.

Simpson v. Commonwealth, 7 Ky. Opin. 38.

It was error for the court to instruct the jury that although they may believe from the evidence that the deceased and the defendant, a short time before deceased was killed, had a quarrel, and that afterwards deceased armed himself with an iron weight with the intention to assault the defendant, yet if they believe from the evidence, beyond a reasonable doubt that the defendant, at the time he stabbed the deceased, brought on the conflict in which the deceased was killed, and first assaulted the deceased in such conflict, and stabbed him, he is guilty of murder.

Botts v. Commonwealth, 8 Ky. Opin. 37.

Malice, like any other fact, is to be found by the jury, and the court should not charge the jury in a murder case that they were bound to find that malice existed if they found certain other facts.

Robinson v. Commonwealth, 9 Ky. Opin. 926.

While it is the better rule for a trial court in the trial of a homicide case to omit any definition of malice, still, where the court does attempt to define it and it does not appear that it could have misled the jury to the defendant's prejudice, this court will not reverse on account of it.

Anderson v. Commonwealth, 10 Ky. Opin. 439.

The law never implies malice from a given fact or facts, but its existence

is in every instance to be determined by the jury; and hence, an instruction is erroneous which informs the jury that under certain circumstances the law implies malice, since under the law in this state it is error to define in an instruction to the jury the term "Implied Malice."

Crittenden v. Commonwealth, 11 Ky. Opin. 193.

The instruction given in a murder case must conform to the proof, and if there is no evidence from which the jury could legitimately infer the existence of malice, an instruction should not have been given as to the effect of malice.

Chambers v. Commonwealth, 13 Ky. Opin. 149.

The law does not imply malice from some one act, but a jury may legally find its existence from such act, because the act may evince a purpose to do a wrong, which is the essence of malice, but no legal presumption of its existence arises from the fact, but it is submitted to the jury upon the question whether malice did or did not prompt one charged with crime.

Farrell v. Commonwealth, 13 Ky. Opin. 988.

In the trial of a murder case, while it is not improper for the court to charge the jury what malice aforethought is in the meaning of the law, it is the province of the jury to determine whether it has been proved to have existed at the time of the killing, and the court has no right to tell the jury what character of act denotes malice nor from what act its existence may be inferred.

Burks v. Commonwealth, 13 Ky. Opin. 1132.

§ 288. Nature and circumstances of act.

An instruction that unless the jury are satisfied from all the evidence, beyond a reasonable doubt, that the defendant purposely and intentionally shot deceased, they must find him not guilty, is more favorable to defendant than he was entitled to.

Townsend v. Commonwealth, 5 Ky. Opin. 785.

An instruction "that the defendant, in a sudden affray, without previous malice, and not in self-defense, did shoot and wound," etc., is erroneous, in that the jury were told that he could not be found guilty unless he fired the fatal shot.

Commonwealth v. Kelley, 3 Ky. Opin. 707.

An instruction: "If they believe from the evidence that N. made S. a proposition to fight a fair fight, and that S. accepted said proposition with the intention to take N.'s life, when he should thus become engaged, and did immediately afterwards, in pursuance of said deadly purpose, kill N. without being under reasonable apprehension of great bodily danger, growing out of threats, or from any other causes, they ought to find S guilty of murder," is erroneous, there being no sufficient evidence of an acceptance by S., of N.'s proposition to fight.

Sinclair v. Commonwealth, 4 Ky. Opin. 315.

Under an indictment for voluntary manslaughter, an instruction: "And they ought to find him guilty of murder," is erroneous in that they are to assume that the commission of a homicide, if willful and without legal justification or excuse, is murder, although it may have been but manslaughter, if done without malice.

Sinclair v. Commonwealth, 4 Ky. Opin. 315.

The court should not, in an instruction group together certain facts, such as threats, previous encounters and the character of the deceased, and give them undue prominence by making the question of guilt depend upon their existence or non-existence.

Carter v. Commonwealth, 5 Ky. Opin. 777.

§ 292. Elements of assault with intent to kill.

An instruction is held erroneous where the court charged the jury that "if the jury are satisfied from the evidence, to the exclusion of all reasonable doubt, that the accused * * * did stab Lewis Gregory with a knife with the intention at the time of such stabbing to kill the said Gregory, and

that not in the necessary self-defense of the accused, then such stabbing is willful and malicious, and the jury will find the accused guilty of willful and malicious stabbing and fix his punishment by confinement in the penitentiary so that it be not less than one, or more than five years," since, to make such charge good it should have been qualified by adding after the words "not in the necessary defense of the accused" the words "nor in sudden heat of passion."

Haywood v. Commonwealth, 8 Ky. Opin. 80.

§ 294. Insanity or intoxication.

Where there is no evidence in a murder trial as to defendant's sanity at the time of the killing, the court is not called on to instruct the jury as to the law governing the defense of insanity.

Finley v. Commonwealth, 13 Ky. Opin. 122.

An instruction in a criminal case, where insanity is relied upon, is correct which informs the jury that the test of responsibility is whether the accused had sufficient reason to know right from wrong and whether he had sufficient will power to govern his actions and that, "If the jury shall believe from all the evidence that the accused was laboring under such a defect of reason as not to know the nature and quality of the act of shooting with intent to kill or if he did know it, that he did not know to commit such act was wrong, then they should acquit," etc.

Richey v. Commonwealth, 13 Ky. Opin. 177.

§ 300. Self-defense.

One who commenced a difficulty which rendered the killing necessary, or apparently necessary, can not voluntarily continue it until he kills his adversary and then be heard to say that he acted in self-defense.

Bowman v. Commonwealth, 7 Ky. Opin. 656.

An instruction should not single out and give undue prominence to certain facts from the mass of evidence, and

state that if these facts are proven, a case of self-defense is made out.

Beazley v. Commonwealth, 7 Ky. Opin. 201.

An instruction which made the right of defendant to shoot in defense of his wife depend on the belief of the defendant is founded upon reasonable grounds that the deceased intended immediately to inflict upon defendant's wife great bodily harm, is erroneous, since defendant had no right to kill deceased if there was any other apparent means of securing the safety of his wife.

Beazley v. Commonwealth, 7 Ky. Opin. 201.

Whether or not the accused acted in his necessary self-defense, is a question for the jury to determine, and not for the court.

Moore v. Commonwealth, 7 Ky. Opin. 218.

An instruction is proper which charged the jury "that if the accused believed and had reasonable grounds to believe at the time he shot the deceased, that he was in immediate danger of losing his life, or great bodily harm from the deceased, he had the right to do what under all the circumstances seemed necessary to him to protect himself from the impending danger, even to the taking of the life of his adversary."

Harris v. Commonwealth, 8 Ky. Opin. 51.

In a trial for murder, where the accused invited the deceased to meet him and settle by pistols who should die, it was proper for the court to qualify the usual instruction on self-defense to the effect that if the fight with pistols was by consent it afforded no excuse for justification.

Whittaker v. Commonwealth, 9 Ky. Opin. 592.

Where self-defense is asserted in the trial of a person charged with murder the court should instruct the jury, in substance, that in deciding whether the defendant was in immediate danger of sustaining great per-

sonal injury he had a right to consider not only the circumstances immediately surrounding him, but any other facts or circumstances in evidence which might reasonably have operated to produce a belief that he was then about to lose his life or sustain great bodily injury from the deceased or others acting in concert with her.

Adkins v. Commonwealth, 9 Ky. Opin. 725.

In a homicide case, where there is some evidence that the offense was committed in self-defense, and the court instructs the jury on the law of self-defense, it should instruct that the right of self-defense depended upon the real or apparent danger as it reasonably appeared to the accused as he was then situated.

Haney v. Commonwealth, 12 Ky. Opin. 207.

In a murder case, where there is some evidence indicating that life was taken in self-defense, it is reversible error for the court to refuse to give an instruction as to the law of self-defense.

Osborn v. Commonwealth, 12 Ky. Opin. 649.

Where the court has fully instructed the jury as to the law of murder and self-defense in such a case, it is error to instruct the jury further by selecting a few facts or rather the theory of the case relied upon by the prosecution and in effect telling the jury that the plea of self-defense had not been established, since it was misleading to the jury, and especially so where the court did not follow up the instruction by an instruction embodying the theory of the defense so that one could offset the other.

Stivers v. Commonwealth, 12 Ky. Opin. 657.

Where the trial court in a murder case instructs the jury fully and correctly as to the law of self-defense, it is not error to refuse to give a particular instruction to the same effect asked by the defendant.

Mays v. Commonwealth, 12 Ky. Opin. 670.

An instruction as to the law of self-defense is erroneous which leaves it

to the jury to determine from the evidence the question as to whether the accused was unlawfully assaulted or attacked by the deceased; but the jury should be told that if they believed, from all the facts and circumstances proved, that the accused at the time he took the life of the deceased, had reasonable grounds to believe and did believe that the deceased was then and there about to take his life or inflict great bodily harm upon him, and that he had no apparently safe means of escape therefrom, he had the right to use such means as were necessary, or as appeared to him in the exercise of reasonable judgment to be necessary, to save his life or himself from great bodily harm even to taking the life of his assailant, and is excusable upon the grounds of self-defense and apparent necessity.

Gist v. Commonwealth, 13 Ky. Opin. 542.

Where the accused is charged with malicious shooting and wounding, and the evidence shows that the person wounded also shot the accused, the evidence being conflicting as to who was the aggressor, and as to whether the accused was defending himself, it is reversible error for the trial court to fail to instruct the jury as to the law of self-defense; since if the firing was returned by the accused to protect his own person, he was not the aggressor, or if he fired the shot after being fired upon, and this was done in a sudden heat and passion caused by the firing of the other, the accused was entitled to an instruction to that effect.

Harris v. Commonwealth, 13 Ky. Opin. 781.

An instruction as to the law of self-defense is not erroneous where the jury are told that they must acquit the accused upon the ground of self-defense if they believed from the testimony that the accused at the time of such shooting believed and had reasonable grounds to believe that deceased was then about to take his life or inflict on him great bodily harm, and that to him in the exercise of a reasonable judgment the only apparently safe means of repelling such

danger, or to him apparent danger, was to shoot the deceased.

Brumback v. Commonwealth, 13 Ky. Opin. 818.

In the trial of a charge of maliciously cutting with intent to kill, a charge is incomplete as to the law of self-defense stating that "If the jury believes from the evidence that the defendant cut Winfrey with an axe, but at the time he believed or had reasonable grounds to believe that his life was in danger, or that he was in danger of receiving great bodily harm at the hands of Winfrey, and that he could not otherwise safely escape, he should be acquitted" for the question is not whether a person having reasonable grounds to believe he is in danger of losing his life or suffering great bodily harm at the hand of an assailant could escape otherwise than by taking life, or using the means in his power in self-defense, but it is always, in such cases, whether he has any other apparently safe means of escape.

Kinglesmith v. Commonwealth, 13 Ky. Opin. 1046.

In the trial of a murder case, when the evidence shows that the deceased was the aggressor, that his two brothers were present, one armed with a revolver, another a knife, and the third a stone, and that the father of accused was trying to prevent a fight, and had grappled with the deceased trying to prevent him from shooting the accused, the father in the meantime calling for help when accused fired the fatal shot, the accused is entitled to have the court charge the jury as to the law of self-defense, and the court's refusal to do so constitutes reversible error.

Burks v. Commonwealth, 13 Ky. Opin. 1132.

§ 301. Defense of another.

Where, in an instruction in a murder trial, the jury were told, in effect, that if the accused wilfully shot and killed the deceased in self-defense they must acquit, but adding that if the jury believed beyond a reasonable doubt the killing took place in a mutual fight, begun and continued to the fatal shot by the accused, he is "not excus-

able" by reason of any counter violence endangering his safety by the deceased, unless the accused in good faith attempted to retire from the conflict or the force used by the deceased was greatly beyond what was necessary to his protection, and where the jury is left to determine the legal meaning of the term "Not excusable," and is not informed of the degree of the offense from which the accused is not excusable under the acts supposed in it, such an instruction is erroneous.

Halsey v. Commonwealth, 10 Ky. Opin. 671.

If there is no evidence from which the jury in a murder case might have found that the accused did the killing complained of in his own self-defense, even an erroneous instruction on the law of self-defense is not prejudicial to a defendant's substantial rights.

Bailey v. Commonwealth, 11 Ky. Opin. 178.

In a case where the deceased had, previous to the shooting, threatened the life of the accused, and on the day of the shooting sought the altercation and was approaching the defendant in a threatening manner when he was shot by the defendant firing four shots at him, the first two taking effect, either one of which would have proven fatal, the other two not taking effect, and being fired after the deceased turned to run and while he was being pursued by the defendant, the following instruction offered by the defendant should have been given: "A person free from fault, when attacked by another who manifestly intends by violence to take his life or to do him some great bodily harm, is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kill in so doing, it is justifiable self-defense; and if Sutterfield (defendant), under the circumstances above stated, believed and had reasonable grounds to believe that his only safety was to pursue Butler (the deceased) and kill him, then the jury should acquit the defendant.

Sutterfield v. Commonwealth, 11 Ky. Opin. 395.

§ 305. Principals and accessories.

An instruction that if the jury believe from the evidence that W was killed as charged, and that the accused was voluntarily present and "approved" of the killing of W, such voluntary presence and approval render him equally guilty with the actual perpetrator of the homicide, without stating what acts would constitute aiding, abetting or other participation in the crime, was held erroneous.

Bligh v. Commonwealth, 7 Ky. Opin. 576.

§ 306. Grade or degree of offense.**§ 307.—In general.**

It was proper for the court to instruct the jury that if they believed the accused guilty, but had doubt of the degree of guilt, they must find him guilty of manslaughter, for if he was guilty it was murder or manslaughter.

Harris v. Commonwealth, 8 Ky. Opin. 51.

§ 308.—Murder.

An instruction in a murder case where self-defense is relied upon is correct which in effect says to the jury that a man can not hunt up his adversary and provoke a difficulty, and then shelter himself from punishment under an assault that he has provoked.

Taylor v. Commonwealth, 10 Ky. Opin. 70.

One convicted only of manslaughter can not be heard to complain or even an erroneous instruction relating only to the law of murder.

Robinson v. Commonwealth, 10 Ky. Opin. 109.

Where in a murder case the evidence indicates that the killing was done by one not indicted with the accused, and the indictment contains no specific charge that the accused was present aiding and abetting the commission of the crime, an instruction is erroneous which states in substance, that if the accused was present, aiding in the commission of the crime, he was as guilty as the man who did the killing; and in the absence of the indictment of the other man and in the absence of a charge against the ac-

cused of aiding and abetting, before he can be found guilty, it must be found that he fired the shot that killed the deceased.

Greenwade v. Commonwealth, 10 Ky. Opin. 127.

Instructions in a murder case should be construed together, and where one, if standing alone, might be error, when considered with others given may not be erroneous; and where, taking all instructions given together, they fairly construe the law of the case, a judgment will not be reversed on account of one of them being erroneous when construed alone.

Frazier v. Commonwealth, 10 Ky. Opin. 133.

An instruction by the court in a murder trial that malice is implied by the law from certain proven facts is erroneous; the jury should be left to determine whether there was malice from all the facts and circumstances proven.

Jannings v. Commonwealth, 10 Ky. Opin. 306.

It is error in a murder trial for the court to charge the jury that if one did the killing without malice aforethought and in his own defense, and yet if the jury believe from the evidence that the accused, who was present but did not do the killing, but who with malice aforethought feloniously and wilfully and not in his own self-defense, knowing the intention of the one doing the killing, aided, counseled or advised the killing, it should find him guilty of wilful murder and fix his punishment at death or life imprisonment.

Deskins v. Commonwealth, 10 Ky. Opin. 350.

A defendant charged with murder, but convicted only of manslaughter is not prejudiced by an instruction in regard to murder.

Robinson v. Commonwealth, 10 Ky. Opin. 603.

§ 309.—Manslaughter.

Where one is on trial for murder by stabbing another, and no witness saw the stabbing, it is not impossible that there may have been a ren-

counter, and that something may have occurred which would reduce the grade of the crime from murder to manslaughter, and if there is any evidence tending to show this the accused has a right to have the jury instructed as to the law of manslaughter.

Adkins v. Commonwealth, 9 Ky. Opin. 467.

Where in a homicide there is no express malice proven, and the evidence shows that the killing took place during a fierce quarrel between the accused and the deceased and his brother and brothers-in-law, the accused is entitled to an instruction leaving to the jury the question whether he did the killing maliciously or in sudden heat and passion and without malice.

Wright v. Commonwealth, 9 Ky. Opin. 929.

Where no one saw the wounding that resulted in the death of decedent, the accused is entitled to an instruction to the effect that, although the jury may find that the accused killed the deceased, not in his necessary self-defense, yet if he did so in sudden heat and passion and without malice, either expressed or implied, they should find him guilty of voluntary manslaughter.

McGee v. Commonwealth, 10 Ky. Opin. 84.

Where in the trial of a homicide case, it is proper for the court to instruct the jury as to the law of involuntary manslaughter, and he fails to give such instruction, such failure can not avail the appellant where the evidence is conclusive that appellant shot with intention to kill, for the failure to give the instruction could not therefore have prejudiced the rights of appellant.

Hawes v. Commonwealth, 10 Ky. Opin. 427.

An instruction regarding voluntary manslaughter is technically incorrect in apparently restricting the law to a case when the heat of passion was produced by a blow or trespass to the person killing; but the passion must arise from what the law regards as an adequate cause, and there may be

other causes than a trespass or a blow.

Anderson v. Commonwealth, 10 Ky. Opin. 439.

Even an erroneous instruction as to involuntary manslaughter is harmless, where a correct instruction as to voluntary manslaughter is given and the jury finds the defendant guilty of murder.

Lee v. Commonwealth, 10 Ky. Opin. 489.

When the trial court undertakes to instruct the jury on manslaughter it should tell the jury of what manslaughter consists.

Greer v. Commonwealth, 10 Ky. Opin. 664.

Legal provocation, such as will reduce murder to manslaughter may consist of an assault or battery of such force, or inflicted under such circumstances as was calculated to produce sudden heat and passion, or a sudden anger.

Cook v. Commonwealth, 11 Ky. Opin. 676.

An instruction in a homicide case that in order to constitute legal provocation so as to reduce a homicide from murder to manslaughter it is necessary that the accused should be in danger of great bodily harm and that it must be shown that a blow or actual trespass to the person has been inflicted is erroneous.

Cook v. Commonwealth, 11 Ky. Opin. 676.

An instruction is correct which informs the jury that if they believe from the evidence beyond a reasonable doubt that the defendant in sudden heat and passion or in sudden affray and upon considerable provocation from the deceased, such as a blow or other actual trespass, and not in self-defense shot and killed the deceased, they must find him guilty of manslaughter.

Stovall v. Commonwealth, 11 Ky. Opin. 670.

Where in the trial of a homicide case in an instruction as to the law of manslaughter the court omitted to say anything about the doctrine of reason-

able doubt, but in other instructions given he fully set forth such doctrine, the instructions given will be construed as a whole and such omission will not be held as prejudicial to the defendant's substantial rights.

Davis v. Commonwealth, 11 Ky. Opin. 934.

Instructions in a homicide case are erroneous and prejudicial to the accused, when under all of them taken together the jury were required to convict him of manslaughter, notwithstanding he may have killed his assailant in his necessary self-defense; and where there is evidence tending to show that the ground of self-defense existed, the accused should have had the full benefit of the law of self-defense.

Rainwater v. Commonwealth, 12 Ky. Opin. 212.

An instruction to the jury in a murder case, where there was some evidence of a fight leading up to the murder, is correct which states to the jury "That the defendant had the right to use any and all means then at his command that were necessary or apparently necessary to ward off or prevent such impending or apparently impending loss of life or great harm." From this instruction the jury must have understood that in the state of case presented the defendant would have the right even to take the life of his assailant.

Stansifer v. Commonwealth, 12 Ky. Opin. 334.

An instruction in a homicide case is correct which says to the jury that if they found appellant was present at the time of the killing, and advised, aided or incited the crime, appellant was guilty of manslaughter, or if the killing occurred during a sudden quarrel between the deceased, the accused and the person doing the killing; but if they found the killing was the result of premeditation or previous agreement, or understanding between the accused and the person doing the killing, they should find the appellant guilty of murder.

Miller v. Commonwealth, 12 Ky. Opin. 341.

Where under an indictment for murder the evidence shows that the defendant was injured by a blow at a dance, without assaulting any one and having no weapon, and when put out of the hall may have been laboring under sudden heat and passion, that might have lessened his offense, it was error for the court not to have instructed the jury as to the law of manslaughter.

Smith v. Commonwealth, 12 Ky. Opin. 534.

The statute providing that in a charge of homicide, if there be a reasonable doubt as to the degree of the offense committed by the defendant, he shall only be convicted of the lower degree, it is error, in a case where the facts and circumstances raise such a doubt, for the court to fail to give an instruction on the law of manslaughter.

Fields v. Commonwealth, 12 Ky. Opin. 576.

The failure of the trial court to instruct as to involuntary manslaughter is not prejudicial to the defendant although there is some evidence tending to show that the killing was accidental, where the court does instruct as to murder and voluntary manslaughter and then tells the jury if it believes the killing was accidental it should find him not guilty of manslaughter.

Duncan v. Commonwealth, 13 Ky. Opin. 144.

An instruction as to the law of manslaughter is erroneous, where it fails to instruct the jury what it takes in law to constitute the offense of manslaughter, but leaves to the jury the determination of whether the killing was or was not unlawfully done.

Gist v. Commonwealth, 13 Ky. Opin. 542.

In the trial of one charged with murder, it is not error for the court to refuse to instruct the jury as to the law of manslaughter and self-defense, where there is no evidence even tending to prove that the killing was done in sudden heat and passion or in self-defense.

Fowler v. Commonwealth, 13 Ky. Opin. 853.

In the trial of one charged with murder, an instruction is incorrect which fails to require the jury to believe, before finding the accused guilty of manslaughter, that he wilfully and unlawfully incited, encouraged, aided and abetted one in killing the deceased.

Edrington v. Commonwealth, 13 Ky. Opin. 792.

§ 310.—Assault with intent to kill.

An instruction is erroneous which informs the jury that if the accused wilfully and maliciously cut and wounded the prosecuting witness with a knife they should find him guilty, in a case where the accused was charged with cutting with intent to kill, for it is not a felony unless the cutting was with the intent to kill, and the charge to the jury said nothing about intent with which the cutting was done.

Head v. Commonwealth, 12 Ky. Opin. 11.

IX. NEW TRIAL.

§ 316. Grounds in general.

One accused of murder can not complain because the prosecution was conducted by an attorney who was not the regular attorney for the commonwealth, such fact not being prejudicial to the defendant, and the fact that the attorney who prosecutes is one of great ability is not a cause for a new trial.

Wayman v. Commonwealth, 10 Ky. Opin. 111.

X. APPEAL AND ERROR.

§ 330. Presumptions in appellate court.

Where the record on appeal in a murder case does not show a conviction by the jury, but does show that the trial court pronounced judgment of guilty, the Court of Appeals will not so far indulge the presumption that there must have been a finding by the jury, as will result in the imprisonment of the defendants during their natural lives, especially where the clerk reports that there is no record in his office showing a conviction by a jury, except a mere memorandum on the back of the indictment.

Wade v. Commonwealth, 10 Ky. Opin. 864.

§ 332. Review of questions of fact.

Since the jury alone, in a murder case, is authorized to determine the effect of evidence introduced, and to pass upon its sufficiency, the Court of Appeals will not disturb its verdict because the evidence may seem weak.

Greer v. Commonwealth, 10 Ky. Opin. 664.

§ 333. Harmless error.

§ 339.—Exclusion of evidence.

Where the accused offered to prove that the deceased was a violent and dangerous man when drinking, it was not error to reject such proof when there was no evidence given that the deceased was drunk, and when, besides, the accused had the full benefit of such testimony from a number of witnesses who testified that the deceased was a violent and dangerous man in stronger language than that contained in the offer made.

Davis v. Commonwealth, 11 Ky. Opin. 934.

§ 340.—Instructions.

Where one is convicted of manslaughter, he could not have been prejudiced by even an erroneous instruction on what constitutes murder.

Halsey v. Commonwealth, 10 Ky. Opin. 862.

Whether an instruction given in a murder case upon the hypothesis of murder is authorized by the evidence or not is not an error that a defendant can complain of, where he is found guilty of a lower degree of homicide only.

Morris v. Commonwealth, 13 Ky. Opin. 87.

It is not reversible error for the trial court in a homicide case to charge the law of murder incorrectly where the defendant is found guilty only of manslaughter, since the defendant could not have been prejudiced by such an instruction.

Galloway v. Commonwealth, 13 Ky. Opin. 428.

Where in a trial of one charged with murder, the court gives an erroneous instruction as to malice, such instruction does not harm the accused

where the jury only convicts him of manslaughter.

Wing v. Commonwealth, 13 Ky. Opin. 565.

Even if an instruction in the trial of one charged with murder, authorizing the jury to find the accused guilty of murder upon certain hypothesis stated in it, is erroneous, still where the jury find the accused guilty only of manslaughter he can not claim to have been harmed by it.

Edrington v. Commonwealth, 13 Ky. Opin. 792.

Whether an instruction as to what constitutes murder is correct or erroneous is immaterial where the accused was acquitted of murder and only held for manslaughter.

Brumback v. Commonwealth, 13 Ky. Opin. 818.

Where the evidence given in the trial of one charged, with murder showed that the accused and deceased entered into a mutual conflict, upon equal terms, each showing an intention to take the life of the other, it was held that the only question for the jury to determine was whether the accused was guilty of murder or manslaughter, and that an instruction as to which of the parties was the aggressor is immaterial; and an instruction which states that the only one of the parties who could be guilty is the one who invited the conflict, is erroneous in that it is more favorable to the accused than the law warrants; and as the instruction did not harm the accused he could not complain of it.

Downey v. Commonwealth, 13 Ky. Opin. 999.

Where an accused charged with murder is convicted only of manslaughter, he can not complain of the trial court for not instructing the jury that he could not be convicted of a greater offense than manslaughter.

Bowling v. Commonwealth, 13 Ky. Opin. 1110.

§ 342.—Verdict.

One charged with murder can not complain of being convicted of manslaughter, since he is not prejudiced by conviction of the lesser offense if

he could have been convicted of one or the other of said offenses, and he is in fact guilty.

Scott v. Commonwealth, 12 Ky. Opin. 10.

§ 348. Reversal.

Before an erroneous instruction can be made the sole ground of reversal it must appear that it is at least probable that the accused may have been prejudiced by it.

Banks v. Commonwealth, 10 Ky. Opin. 297.

Where the whole law of homicide is clearly and correctly given by the trial court to the jury, the defendant can not successfully urge the reversal of the cause for the reason that the jury have assessed the punishment at death, when under the evidence it might have been justified in returning a verdict for manslaughter.

Davis v. Commonwealth, 12 Ky. Opin. 690.

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HUSBAND AND WIFE.

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I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

§ 4. Support of family.

The duty of a husband and father to support his wife and family is paramount to that of paying his debts, since he owes to his wife and children such labor and means as may be necessary for their support, and this includes the expenditure of both labor and means necessary to provide for them a habitation.

Faulkner v. Jennings, 11 Ky. Opin. 399.

§ 6. Property of husband.

The husband has a right to sell his real estate regardless of his wife's wishes, and can pass to the purchaser a complete title, except the potential right of dower.

Whitesides v. Cushenberry, 10 Ky. Opin. 413.

§ 7. Property of wife.

The husband has the right to make himself the absolute owner of his wife's property by reducing it to possession, but if he agrees to take and hold the same as trustee for his wife, he thereby waives that right.

Johnson v. Leach's Admr, 5 Ky. Opin. 528.

The personal property of the wife belongs to the husband and is free from her control so long as the relation of husband and wife continues.

Flanagan v. Thurman, 3 Ky. Opin. 389.

§ 9.—Real property.

Where a woman took a vested remainder in property at the death of her father, and afterwards married, such interest vested in her husband upon her marriage.

Young v. Nesbit, 8 Ky. Opin. 730.

§ 10.—Personal property.

The retention and use of the personal property of the wife, by the husband after her death, will imply a promise to make a reasonable compensation therefor.

Pendleton's Admr. v. Lawson, 2 Ky. Opin. 466.

The separate property of the wife would by law vest in the husband, yet if he does not so regard it, but recognizes it as belonging to the wife exclusively, such property will not vest in him; however, such rule can not be made the instrument of defrauding creditors.

Rice v. Johnson, 2 Ky. Opin. 440.

A debt contracted before the marriage between the parties is extinguished by the marriage.

Ratcliffe v. McGrewder, 8 Ky. Opin. 766.

The husband is the real owner of a note given for the sale of his wife's land, but taken in his name and re-

duced to his possession, and he may pledge such note as collateral; and upon the death of the wife her heirs can not maintain a claim to such note.

Chick & Deut v. Tucker, 11 Ky. Opin. 90.

§ 11.—Reduction to possession by husband.

Personal property of the wife reduced to possession by the husband belongs to him, and a contract between a husband and wife by which property is settled upon her is void, and can not be upheld as against creditors in a common-law court; and even in equity such contracts are upheld only where the evidence is clear as to the agreement, and the rights of creditors are protected.

Carran v. Mitchell, 10 Ky. Opin. 635.

Where the wife owns notes and the husband reduces them to possession, and on their renewal had them made payable to himself by the wife's consent, it is sufficiently shown that the notes have become the property of the husband, and a promise of the husband to the wife made after he becomes the owner of the notes will not authorize the chancellor to divest the husband of title.

Mattingly v. Wiseman, 10 Ky. Opin. 813.

§ 13.—Rights of husband's creditors.

The fact that a husband many years ago received money from his wife's father for purposes of investment in the wife's name, but such purposes were not carried out by him, although he had promised his wife to do so, will not, as against the husband's creditors, entitle the wife to claim the ownership of real estate purchased with such money and conveyed to the husband.

Wallender v. Wintersmith, Walker & Co., 11 Ky. Opin. 83.

Where in the settlement of an estate, real estate belonging to the wife and allotted to her was without her knowledge or consent conveyed by the trustee to herself and husband, and the wife ascertains this fact only after several years and after her separation from her husband, a court of equity at the suit of the wife will

reform the deed and deprive the husband of all interest in the property.

Cowan v. Cowan, 9 Ky. Opin. 807.

A conveyance made to a husband and wife, where the title is not so taken for the purpose of defrauding creditors, is effectual to invest the wife with an undivided half interest in the property, subject to the vendor's lien, if any, for unpaid purchase money.

Christofer v. Searcy, 9 Ky. Opin. 84.

Where, by a written instrument, real estate is transferred to a husband and wife, and at the death of the husband and wife, the lands are to be equally divided among all the children, and it is provided in the instrument that the conveyance is made "for their mutual and joint support and to the survivor of them," the word "their" is held to refer to the husband and his wife, and not to them and their children.

Neil v. Neil, 10 Ky. Opin. 571.

A conveyance of land made to a husband and his wife is held jointly by them, and on the death of the wife her interest in the land passes to her child, subject to the husband's curtesy.

Boyd v. Wilson, 11 Ky. Opin. 547.

§ 14. Conveyance to husband and wife. Where land is conveyed to husband and wife the survivor takes the whole estate.

Beavan v. Berry, 4 Ky. Opin. 568.

§ 15. Conveyance by husband and wife. A married woman can not convey real estate except by a writing in which her husband joins, unless he has already conveyed.

Vessels v. Druz's Admr., 9 Ky. Opin. 755.

Where a husband and wife unite in a mortgage by which they convey the absolute title, conditioned that the title will revert upon the payment of the debt which the mortgage secures, such a conveyance deprives the wife of all interest, both dower and homestead.

Cutsinger v. Norris, 9 Ky. Opin. 568.

Where a husband and wife join in a general conveyance of real estate, all the wife's interest is conveyed, and if it is her husband's land such deed effectually relinquishes her right of dower therein.

Anderson v. Gill, 9 Ky. Opin. 870.

A married woman conveys no title by a deed in which her husband does not join.

Davis v. Rains, 10 Ky. Opin. 519.

Where a husband and wife convey real estate, reserving in the deed a lien for the sum of \$75 per year so long as either or both of the grantors shall live, the creditors of the vendee have no liens upon the land, and the lien of the grantors must be first paid out of the rents and profits.

Walker v. Prethoff, 11 Ky. Opin. 143.

A married woman must acknowledge the conveyance to pass her estate, and this must appear from the certificate of acknowledgment, and where the husband conveys as the grantor and she only acknowledges it as to a certain interest or to a certain extent, it is only effective to that extent.

Strunk v. Manney, 13 Ky. Opin. 578.

§ 16. Possession between husband and wife.

Where any real estate is devised to husband and wife there is no mutual right to the entirety by survivorship between them; but they shall take as tenants in common, unless a right of survivorship is expressly provided for and the respective moieties is subject to curtesy or dower.

Bryant v. Owen, 5 Ky. Opin. 33.

§ 17. Contracts with third persons in general.

Where the wife paid her husband's debt, out of her own funds, and by a sale of her own real estate, and the debt paid was secured by a mortgage lien, and before paying the debt she contracted with her husband's creditor that she was to have his security or lien, her husband assenting thereto, she is entitled to hold such lien.

Kinney v. Wheeler, 10 Ky. Opin. 40.

§ 18. Antenuptial debts of wife.

It is error to render a personal judgment against a husband for debts created by the wife before marriage.

Sellers v. Dever's Admr., 3 Ky. Opin. 590.

A husband who receives an estate by his marriage is legally bound to pay the debts of his wife existing at the date of the marriage.

Bell v. Rogers, 9 Ky. Opin. 292.

§ 19. Necessaries and family expenses.

The fact that goods purchased by the wife were, without her knowledge and consent, charged to her instead of her husband, will not make her a debtor instead of the husband.

McDaniel & Moore v. Vaughn, 6 Ky. Opin. 521.

It is the duty of the husband to furnish medical attention and pay the burial expenses of his wife, and he can not be relieved therefrom only by ante-nuptial contract.

Trible v. Ellison, 1 Ky. Opin. 59.

A wife has a right to refuse to live with a husband who had taken up with another woman, holding her out to the world on some occasions as his wife, and with whom he publicly associated.

Arbegust v. Alvary, 4 Ky. Opin. 459.

A husband is held liable for the support of his wife and family, where shown that the wife was without fault, she not having the means of an individual support.

Arbegust v. Alvary, 4 Ky. Opin. 459.

Notice by a husband that he would not be responsible for maintenance of his wife and child, who had refused to further associate with him, is insufficient, and may be disregarded by one to whom the wife applied for sustenance.

Arbegust v. Alvary, 4 Ky. Opin. 459.

It is the duty of a husband to support his wife and family, for the claim of the wife on the husband for her support is as sacred, at least, as that of creditors; and the fact that the

wife is made a feme sole does not release the husband from his obligation to support her.

Mayo v. Ferguson, 11 Ky. Opin. 530.

§ 20. Agency of wife for husband.**§ 23.—Contracts.**

Where a wife entitled to dower in real estate sought be sold authorizes her husband to employ an attorney, and he does so, and an answer is filed for her, claiming an interest in the real estate but consenting to its sale, and offering to take her interest out of the purchase-money; and where no fraud or bad faith is practiced by her husband or attorney, she is bound by such answer whether she knew what was in it or not, and a sale of such real estate is valid and binding on her.

Simpson v. Coons, 10 Ky. Opin. 538.

§ 25. Agency of husband for wife.

Where the husband had possession and control of land, and contracted for the erection of buildings thereon, he is presumed to be the owner, and, *prima facie*, a mechanic's lien for unpaid balance due thereon will attach.

Cane v. Bergen, 3 Ky. Opin. 84.

Where a husband permits his wife to hold herself out as a feme trader, when in fact she is not such trader, the property made out of the commerce she was pursuing legally belongs to her husband, and she will be regarded as his agent and her obligations and liabilities thus made are binding on him.

Main v. Carter, 3 Ky. Opin. 393.

A husband cannot divest his wife of her interest in lands by transferring a note given her for the purchase price thereof, in exchange for another note, the latter of which became worthless by reason of the bankruptcy of the maker of the last note.

McGowan v. Burton, 4 Ky. Opin. 407.

An action will not lie by a wife against the purchase of her personal property from her husband, where she afterwards accepted an assign-

ment of a pending suit, brought originally in the name of her husband; nor can she sue the purchasers, she having failed to receive from her husband's attorney a part of the purchase-money paid to him through order of court on the account.

Whayne v. Howard, 4 Ky. Opin. 505.

II. MARRIAGE SETTLEMENTS.

§ 28. Requisites and validity.

§ 29.—Antenuptial settlements.

Under § 3, art. 3, ch. 47, R. S., a husband is liable for the antenuptial debts of his wife to the extent of her property received by him, exclusive of real estate and slaves.

DeLand v. Blynn, 7 Ky. Opin. 635.

Where parties in contemplation of marriage entered into an agreement by which their property was to be kept separate, and neither was to have an interest in the other's estate, and were not to claim curtesy or dower after death, by the terms of the contract the survivor could not retain property in his own right, under the statute, as administrator of his deceased wife.

Tribble v. Ellison, 1 Ky. Opin. 359.

Where P, in anticipation of marriage with M, entered into an antenuptial contract with her in which he stipulated that "after she becomes his wife she may hire out her own slave, use the proceeds as she pleases, and that she shall have full power and control over her money and property, and dispose of the same as she pleases"; the effect of the instrument is to place the title of the property therein named in his wife after their marriage, with all the rights and powers over same that she would have had if she remained unmarried, and upon her death it went to her personal representative.

Pendleton's Admr. v. Pendleton's Exr., 1 Ky. Opin. 500.

The written consent of the husband to the use of the wife's property, made at the date of marriage, and at-

tached to and recorded with the wife's will, is an antenuptial contract.

Pendleton's Admr. v. Lawson, 2 Ky. Opin. 466.

Where an antenuptial contract provides, among other things, that the property of the wife shall remain as if the marriage had never taken place, it leaves no room for construction, and excludes the husband from participating therein.

Gassaway v. Smith, 7 Ky. Opin. 446.

Where the purpose of an antenuptial contract is to exclude the husband from participation in the wife's property, and when a trustee is appointed thereunder, but by its terms she reserves the right to the entire income from the property, and may direct her trustee to sell and convey her real estate and invest the income or proceeds in other property, to be held by such trustee upon the same terms, and when she has the power under such contract to direct her trustee in every move he is to take, she has all the power over the estate that she would have had if she had remained unmarried, and may mortgage the property to raise money if she so desires.

Dudley v. Hilliard, 10 Ky. Opin. 520.

Where by an antenuptial contract the husband agreed to secure the wife in the amount received by him from her, such an agreement is a good consideration for a conveyance to her of real estate after the husband became embarrassed financially, and such a conveyance will be enforced and will not be disturbed where made before liens attach and no allegation or proof is made that the land exceeded in value the sum received by the husband from his wife.

Norsworthy v. Sparks, 12 Ky. Opin. 281.

A contract entered into after marriage can not be held binding as an antenuptial contract, but the evidence in this case conduces to show that the

contract was made and executed before the marriage.

Broomfield v. Broomfield, 13 Ky Opin. 571.

Where an antenuptial agreement provides that the wife shall have and retain the title to her property and all property that may descend to her or be purchased by her, and the husband should have the same rights as to his property, it is held that this agreement converted the estate of the wife into a separate estate, so as to vest in her the right to dispose of it by will, under Gen. Stat. 1883, ch. 113, § 4.

Trall v. Trall, 13 Ky. Opin. 666.

§ 30.—Postnuptial settlements.

Where a husband and wife agree to separate, and a suit for divorce is pending between them, and they enter into a written contract, giving the wife certain personal property, which is delivered to her, she has good title to such property, and such contract may be introduced in evidence to prove her title.

Burns v. Roberts, 9 Ky. Opin. 379.

So long as the husband neglected to reduce the money and property of his wife to possession, she might have applied to the chancellor and compelled him to make an equitable settlement out of the property; and, since she might have done so by proper legal proceedings, there is no good reason why he might not voluntarily settle it upon her out of court.

McConnell v. McConnell's Heirs, 12 Ky. Opin. 93.

§ 31. Construction and operation.

A wife may dispose of her separate estate secured to her by antenuptial contract when she reserves the right so to do.

Daniel's Devises v. Daniel, 5 Ky. Opin. 670.

Where the language of an antenuptial agreement indicates that all the estate then owned or might afterward be acquired by the wife, whether real or personal, was intended to be embraced in the contract, but the conveyance to the trustee made for the purpose of carrying the agreement

into effect, conveyed only such personal property as she then owned or might afterwards acquire, the realty did not pass by the deed to the trustee.

Daniel's Devises v. Daniel, 5 Ky. Opin. 670.

III. CONVEYANCES, CONTRACTS AND OTHER TRANSACTIONS BETWEEN HUSBAND AND WIFE.

§ 36. Validity of transactions in general.

A husband has the right to secure to his wife and family a home, when it is not done at the expense of his creditors, but he cannot add to his wife's estate by his labor and thereby increase her estate regardless of the claims of his creditors.

Mathews v. Murphy, 5 Ky. Opin. 131.

Where the wife pays off and takes up a lien note held against her husband, using her own money for such purpose, she may retain the lien as a lien note against her husband; and his creditors are in just as good a position as if the note were still held by the original payee.

Miner & Co. v. O'Sullivan, 9 Ky. Opin. 180.

Where no cause for a divorce is shown to exist, if a husband hires his wife to leave him, she can not recover the price agreed to be paid, unless there was some other cause for the separation, for this would be against public policy.

Jones v. Jones' Admr., 9 Ky. Opin. 287.

Parol contracts between the husband and wife as to the personality of the wife in his possession and under his control will not be permitted to interfere with the claims of creditors of the husband.

Dutlinger v. Salmons, 11 Ky. Opin. 331.

§ 43. Loans and advances.

A married woman will be protected to the amount which she has in good

faith paid out of her own estate on land purchased by the husband.

Lucas v. Muston & Arthur, 1 Ky. Opin. 449.

Where the proceeds of the wife's property had been invested in the lands sought to be subjected to the payment of the husband's debts, before that can be done a settlement must be made upon the wife suitable to her support, and if it requires for that purpose the full amount raised by the sale of the land in question it must be so applied.

Jennings v. Jennings, 1 Ky. Opin. 611.

Where the wife's claim is a mere equity and there is no legal demand to which she can be substituted, such a claim cannot be enforced to the prejudice of her husband's creditors, and for this reason her claim is not embraced in the statute providing for the settlement of insolvent decedents' estates, making all debts and liabilities of equal dignity and payable ratably.

Hughes v. Hughes, 5 Ky. Opin. 681.

§ 46. Contracts for conveyance of real property.

A voluntary deed, made by a husband to his wife upon an agreed separation, where the wife neither sues him for, nor appeals to him for, support, is held to be a sufficient consideration, as it will bar her from any other claim on him.

Williams v. Williams, 3 Ky. Opin. 363.

The release by a feme covert of her potential right of dower in the land sold by her husband to another, formed a valuable consideration, sufficient to uphold a settlement on her to the extent of the value of said potential right, even against the creditors of her husband.

Ford v. Ford, 3 Ky. Opin. 416.

Where it is shown that lands purchased by a husband, no conveyance having been made to him, were settled by his purchase-money bonds being discharged by the wife relinquishing her interest in her father's estate,

it is held, as between her and her husband's creditors, that the lands belonged to the wife.

Field v. Field's Admr., 4 Ky. Opin. 135.

Where the evidence fails to establish any act or acts upon the part of the husband tending toward coercion, the questions of delicacy and propriety cannot be considered by courts of justice.

Kline v. Flaughter, 5 Ky. Opin. 197.

A wife cannot convey land to her husband, because she cannot, on account of her disability of coverture, unless her husband joins her in its execution, and he cannot join in a deed to himself.

Sayers v. Coleman, 5 Ky. Opin. 733.

A married woman can not make a valid contract for the sale of her land, and since such a contract is void it can not be ratified by her after the death of or divorce from her husband.

Chaney v. Flynn, 11 Ky. Opin. 164.

§ 47. Conveyances by husband to or for wife.

A conveyance by a man to a woman in consideration of a marriage is legal when the parties have capacity to contract.

Waller's Admr. v. Harrison, 8 Ky. Opin. 717.

The release of the right of dower by a married woman is a valuable consideration for an agreement to cause other real estate to be conveyed to the wife, and where such real estate is wrongfully conveyed to the husband the wife, in a contest with the husband's creditors, may recover the land when no fraud is shown.

Spencer v. Spencer, 9 Ky. Opin. 825.

§ 48. Conveyances by wife to or for husband.

Where real estate is conveyed by the wife for no other consideration than as a token of her purpose to reform, and after the marital relation and the cause of the husband's shame and mortification are entirely re-

moved, such conveyance will be set aside.

Westcott v. Maxwell, 10 Ky. Opin. 511.

Where a wife signs and acknowledges a conveyance, and it is lodged in the proper office for record, the failure of the clerk when it was recorded to insert the name of the wife will not affect the rights of the grantee.

Standeford v. Bates, 11 Ky. Opin. 154.

§ 49. Gifts.

§ 49½.—Gift by husband to or for wife.

An antenuptial contract will not prevent a husband from giving property to his wife, and where during his lifetime she has some notes which she claims to have received as a gift from her husband, and he knew about it and made no objection, but thereafter by his will directed his executor not to exercise any control over her property, all these circumstances tend to show a gift to her of the notes.

Galbraith's Admr. v. Galbraith, 12 Ky. Opin. 589.

§ 49¾.—Gifts by wife to or for husband.

The wife has a right to give property to her husband, to permit him to use her property, or to pledge it as security for his debt.

Walker v. Spaulding, 10 Ky. Opin. 620.

IV. DISABILITIES AND PRIVILEGES OF COVERTURE.

(A) IN GENERAL.

§ 55. Status of married women in general.

The marriage of a creditor with her debtor releases the debt in law, on the principle that husband and wife are one person, but equity so far qualified this rule as to permit a feme sole to sell and enjoy her property.

Evans v. Leech, 5 Ky. Opin. 654.

The wife's coverture not only avoids her note, but exempts her from any personal judgment.

Thomas v. Greenwad's Exr., 1 Ky. Opin. 365.

(B) PROPERTY AND CONVEYANCES.

§ 68. Capacity to take and hold property.

Where a married daughter of a testator contracted with the executor for the purchase of a house and lot belonging to the estate, and agreed that the purchase price should be taken out of her portion of the estate as it becomes payable, and the property was occupied by the daughter and her husband as a home, the transaction was held not void on the ground of coverture.

Doom's Exrs. v. Doom's Devises, 7 Ky. Opin. 702.

While a married woman can not bind herself personally by her contract, she is capable of receiving and holding the title to real estate, and she will be bound as though by an executed contract, so far as to entitle the grantor to retain any purchase money paid him by or for her and to subject the property to the payment of any balance due thereon.

Goggin's Exrx. v. Hutchinson, 9 Ky. Opin. 866.

A married woman is capable of receiving the title to real estate, and a conveyance to her is therefore not void; and while a lien for balance of purchase money may be enforced against her property, such claim can not be enforced against her personally.

Goggin's Exrx. v. Hutchinson, 9 Ky. Opin. 889.

§ 69. Capacity to convey.

Under Act of Feb. 13, 1866, entitled "An Act to amend § 17, art. 4, ch. 47, R. S.," a wife to whose sole and separate use land has been transferred, may mortgage the land by joining with her husband, and thereby render the land liable for his debts.

Whitaker v. Clark's Admr., 7 Ky. Opin. 81.

Where a husband enters upon land with his wife, and in her right, under an arrangement with the executor of her father, he cannot, while thus occupying, set up an adverse claim to her, and as he has only a life estate by the curtesy, nothing more passes by his deed or mortgage.

Smith v. Warth, 5 Ky. Opin. 269.

Where it is provided in a will that "the real estate herein devised to said Lee Ann Smith, now Moore, I direct in case of marriage, to be entirely free from the control or disposition of her husband, and not in any way subject to his debts," the devisee, after marriage, her husband joining with her, may convey all the title of the devised real estate to her purchaser.

Graham v. Moore, 8 Ky. Opin. 271.

The statute does not permit a married woman to sell or incumber her separate estate, nor can she estop herself of the right to claim it, by such representations as would estop other persons free from statutory disability.

Thomas v. Rowlett, 8 Ky. Opin. 578.

The disabilities placed upon married women are for their protection, and they can not be divested of their title to real estate, unless the requirements of the statutes authorizing them to alienate their lands are substantially complied with.

Thompson v. Bratton, 8 Ky. Opin. 609.

A mortgage of the wife's land, she holding a general estate, to secure the debt of her husband, executed jointly by herself and husband, is valid.

Douglass v. Stone, 8 Ky. Opin. 669.

The statutes empowering a married woman to convey by joining her husband in a deed gave her the right to convey, whether founded on a valuable consideration or not.

Cox v. Chelf, 9 Ky. Opin. 642.

Under the statute of 1856, a voluntary conveyance by a husband to his

wife without consideration is void as to his then existing liabilities.

Duncan v. Gaines, 9 Ky. Opin. 839.

§ 70. Requisites and validity of conveyances.

The evidence was held to show that a wife was coerced by her husband into the signing and acknowledging of the execution of a mortgage.

Bradley's Exrs. v. Lyles, 7 Ky. Opin. 462.

A purchaser of land, under contract with a married woman, is not bound to accept a deed executed solely by her.

Canfield v. Labor, 7 Ky. Opin. 184.

A married woman can not be compelled to convey her interest in land, but must do so voluntarily, and a conveyance made by her in obedience to an order of court should be disregarded.

Hukill v. Bramlett, 7 Ky. Opin. 151.

§ 71. Trusts.

Where shortly after marriage, the husband being unable to provide for himself and wife, his father-in-law furnished the wife with the necessities to start them to housekeeping in addition to presenting her with cows, a horse and negro servant; and this property was afterwards sold by the husband, the proceeds from which were paid toward the purchase of a house and lot, and the balance of \$1,500 was paid by the father-in-law with the understanding that the property was to be secured for his daughter's use; but the deed was made to the husband; this did not affect the wife's interest in so far as to subject the property to the individual debts of her husband, except as beyond her equity.

Rice v. Johnson, 2 Ky. Opin. 440.

Where the husband bought and paid for land and had the legal title conveyed to himself in trust for the separate use of his wife and of her children during life and after her death the remainder for said children, the husband was not only trustee of the trust, but had a legal right in con-

junction with his wife to sell or mortgage her interest for her support.

Patterson v. Hutchinson, 2 Ky. Opin. 460.

A deed from husband to wife, though technically invalid, is held good where it is shown that the land embraced therein was paid for by the wife out of her patrimony, and the deed made to the husband through mistake.

Wright's Admr. v. Gillum, 2 Ky. Opin. 488.

§ 72. Gifts.

Appellant had before her second marriage sold her dower interest in the lands of her first husband, and converted it into money, and her husband possessed himself of the money by her consent after his marriage, and it therefore became his, and his legal right to it when reduced to possession was perfect.

Francis v. Rice, 4 Ky. Opin. 201.

A married woman may give property to her mother with the consent of her husband.

Bell v. Rogers, 9 Ky. Opin. 292.

Where a wife is dangerously ill, and in view of dissolution hands a note owned by her to her mother, and when her husband afterwards comes into the room, she tells him what she has done, and he makes no reply, his silence under such circumstances will not be construed into a consent on his part to such gift.

Bell v. Rogers, 9 Ky. Opin. 292.

§ 73. Ratification.

Where a married woman, during coverture, purchased a house and lot for a home, and continued to hold the property for many years after removal of coverture, it amounted to a ratification of the contract.

Doom's Exrs. v. Doom's Devises, 7 Ky. Opin. 702.

§ 74. Avoidance.

The rule that an infant can not reclaim property, without returning the money for which it was sold, does not apply to a married woman.

Owsley v. Montgomery, 9 Ky. Opin. 913.

§ 75. Jurisdiction of courts.

The statute provides that upon the joint petition of husband and wife, a court of equity is invested with the power to authorize a married woman to use, sell and convey any property she may have or thereafter acquire, and may contract, sue and be sued as a feme sole.

McDonald's Trustee v. Hayman, 5 Ky. Opin. 116.

§ 76.—In equity.

Where there has been a long acquiescence in the sale of land by a married woman, who still survives, and the heirs of the deceased one are willing that the sale should be confirmed, and as a good title can be decreed, it is more equitable to sustain the sales than to set them aside.

Vertrees v. Rush, 2 Ky. Opin. 49.

(C) CONTRACTS.

§ 78. Contracts before marriage.

A woman who marries after a note is executed to her has no power or right to assign it, unless her husband gives her authority to do so or assents to her doing so, but he may thereafter ratify such assignment, and in that case the title of the assignee is good.

Hall v. Campbell, 12 Ky. Opin. 270.

§ 79. Capacity to contract.

Where a married woman, without consideration, undertook, under certain conditions, to pay one of plaintiff's obligations already assumed on an injunction bond, the undertaking is a nudum pactum, and can not be enforced.

Price v. Peak, 7 Ky. Opin. 108.

Where a married woman, by writing, assumes to indemnify a surety by agreeing under certain conditions to pay an obligation for which she is not liable, the court will not so enlarge her powers as to place her on a plane with a feme sole as to third persons.

Price v. Peak, 7 Ky. Opin. 108.

An act of the legislature making a married woman a feme sole for the transaction of business, must not be construed as permitting her to assume

the husband's liabilities upon any other consideration than her moral obligations to pay them.

Bonnie v. Rathborne, 7 Ky. Opin. 727.

The contract of a married woman to buy land is void since she is not capable in law to make a valid contract, and the court will release her from such a pretended contract and permit her to recover what she has expended thereon.

Robinson's Trustee v. Robinson, 9 Ky. Opin. 788.

A contract of a married woman to pay money is void, and while she may, after she ceases to be a married woman, consent that her real estate be ordered sold to pay the debt, where she does not then make a new promise to pay such debt no personal judgment can be taken against her.

Green v. Whalley, 8 Ky. Opin. 240.

While a contract of a married woman, such as under the statute does not bind her or her estate, is void as to her, it is valid as to persons who sign it, and who are not under disability.

Dodd v. Rynearson's Admr., 8 Ky. Opin. 672.

A woman having a living husband from whom she has not been divorced, can not make a binding contract to marry another conditioned upon a divorce being granted.

Webb v. Forman, 8 Ky. Opin. 697.

A contract of a married woman, not entitled to transact a separate business, is void, but when she has parted with money or property by reason of such contract, her husband must join her in an action to recover.

Mitchell v. Bailey & Co., 8 Ky. Opin. 774.

The wife is under no moral obligation to pay her husband's debts, and therefore a promise by her to apply the proceeds of a life insurance policy to that purpose is without consideration.

Minter's Admr. v. Englehard, 9 Ky. Opin. 745.

Where a married woman accepts a deed of conveyance and holds the title, she can not bind herself personally for the price, but in such a case equity will declare a lien on the land for the balance of purchase price as the only means of enforcing payment, and where the debt has been assigned the assignee may proceed against the land for payment.

Langhorn v. Lebanon & Calvary Turnpike Co., 10 Ky. Opin. 62.

A contract to pay money to a married woman is as valid as a contract to pay to any other person, and one who has borrowed and received money from her can not be heard to say that his contract to repay her is not binding upon him because of her coverture.

Wickware v. Thompson, 10 Ky. Opin. 205.

§ 80. Requisites and validity of contracts in general.

The plea of coverture will protect a wife against specific enforcement of an executory sale by her husband and herself; but under appellant's prayer for general relief, he is equitably entitled to a restitution of the amount paid by him to the appellee and her husband, as a successful resistance would be a fraud on appellant, and therefore, by a resulting trust, a lien attached to her equitable interest in the land.

Pardner v. Grugan, 3 Ky. Opin. 375.

A married woman can not be compelled to complete an executory contract, but she will not be relieved against an executed contract on the sole ground of her coverture.

Fritz's Admr. v. Cofer, 9 Ky. Opin. 653.

The release by a wife of her dower interest constitutes a valuable consideration to support a contract between the husband and wife and the husband's creditors, made through their representative, the assignee.

Bates v. Scobee's Assignee, 11 Ky. Opin. 608.

§ 85. Bills and notes.

A note executed by a feme covert for the purchase-money of land bought by her can not be enforced.

Mills v. Chelf, 6 Ky. Opin. 719.

A mortgage by a wife, on her property, as accommodation endorser for her husband's debts, is good and liable to the acceptors of a bill of exchange, though the mortgage be given to payees thereon, who endorsed same over to such acceptors.

Ross v. Brannin, Summers & Co., 3 Ky. Opin. 528.

Where B was, at the time she executed a note, the wife of D, by reason of her disability the note is not obligatory on her.

Beatty v. Curtis, 4 Ky. Opin. 673.

When a married woman is not liable on a note because of coverture, her surety on such a note, who pays the same, can not recover from her, since her creditor could not recover from her, her surety can not.

Porter v. Field, 8 Ky. Opin. 72.

If at all, it is only in exceptional cases when the note of a married woman can be made the foundation of an action in favor of her husband.

Ross v. Ross, 8 Ky. Opin. 272.

Where a note is executed by the wife to the husband, to be enforced there must be some contract back of it authorizing the chancellor to interfere to prevent a fraud or great wrong to the husband, since the note itself in such a case does not evidence a consideration.

Ross v. Ross, 8 Ky. Opin. 272.

The note of a married woman does not bind her personally; since it can not bind her personal estate unless signed by herself and husband and executed for necessities for herself or family.

Ross v. Ross, 8 Ky. Opin. 272.

The assignment of notes made by a married woman can not convey title to the notes.

Hardwick v. Crow, 8 Ky. Opin. 394.

The note of a feme covert is void, but she can not claim the property and withhold payment, but she must surrender the property received as the consideration to the creditor or vendor.

Malone v. Roy's Admr., 9 Ky. Opin. 537.

Where the husband receives money from his wife and executes to her his notes, promising to repay her, such obligations can not be enforced by the wife as against the husband's creditors.

Nichols v. Scarce, 10 Ky. Opin. 715.

A married woman can not enter into a contract which will bind either her or her estate, but when a contract for the purchase of land, which has been executed, has been entered into by her and her husband for her benefit and the conveyance is made to her, the above rule is not applicable since the contract is in fact that of the husband although evidenced by note signed by the wife alone.

Miller v. Haynes' Assignee, 12 Ky. Opin. 228.

A married woman who has executed a note, not for necessities, who makes no defense but allows judgment to be taken against her as well as against her husband and a surety, is not estopped from showing, when the surety has paid the judgment and taken an assignment of it, that she was, at the date of the judgment and ever since has been, a married woman, and that her property can not be levied upon to pay such judgment.

Price v. Keeney, 12 Ky. Opin. 530.

Where it is alleged in a petition that the wife never executed the note sued upon, her estate after her death can not be subjected to pay it.

Patterson's Exr. v. Gorin, 13 Ky. Opin. 805.

§ 86. Purchases and sales.

A mere executory contract executed by a married woman for the purchase of land can not be enforced against her or her sureties on the purchase-money notes.

Mills v. Chelf, 6 Ky. Opin. 719.

While a title bond executed only by a married woman is not enforceable, when she receives the purchase-price and purchases other property with it, a court of equity will not permit her to retain both the purchase-money and the property sold on such bond.

Ellis v. Baker, 8 Ky. Opin. 175.

§ 87. Guaranty or suretyship.

Where a wife furnishes counter security to a surety on husband's guardian's bond, her property will not be subject to sale by the surety, until a pro rata distribution of liability has been adjudged, and he has been compelled to pay the same.

Calhoun v. Johnson, 4 Ky. Opin. 162.

The fact that a creditor's agent took from the debtor a mortgage on a crop of tobacco then in the debtor's possession, to secure payment of the note sued on, could not have the effect of increasing the risk of the debtor's wife as surety, nor prevent her from taking steps to indemnify herself against apprehended loss.

Patterson v. Field, 5 Ky. Opin. 393.

Where a wife has been invested with the powers of a feme sole, her promise to pay her husband's debt for property purchased by him, was held void for want of consideration, the husband's liability still existing.

Bonnie v. Rathborne, 7 Ky. Opin. 727.

Where a wife has been declared a feme sole, and she promised to pay a debt contracted by her husband for property of which she is the beneficial owner, her undertaking is supported by sufficient consideration to render her liable for the debt, the husband's liability having terminated.

Bonnie v. Rathborne, 7 Ky. Opin. 727.

Where a note was first signed by the husband and then by the wife, the presumption is that the wife signed as surety for the husband.

Percival & Co. v. Grant, 9 Ky. Opin. 197.

An agreement of a married woman to pay the debts of her husband is void, but where land belongs to the wife, the husband and wife have the right to sell it, and such an act is not within the provisions of the statute to protect creditors against conveyances made to prefer, etc.

Pendy v. Morton, 10 Ky. Opin. 501.

§ 88. Releases.

A covenant by a husband to release all claim in and to his wife's estate, whether unexplained or modified by anything else, can not be construed as a surrender or waiver of his right to take the interest in his wife's estate which would otherwise be secured to him by law in case he survives her.

Morgan's Admr. v. Nicholas, 6 Ky. Opin. 402.

§ 89. Ratification.

Where defendant spoke of paying her debts and said they ought to be paid, and that she was going to pay all her debts, but did not say particularly that she was going to pay the debts in suit, such a conversation cannot be construed into a promise to pay the notes in suit, when she was then resisting the collection of the same.

Henking, Allemong & Co. v. Harris, 5 Ky. Opin. 531.

§ 90. Avoidance.

Where real estate is sold on a title bond to the husband, and by his direction the bond was payable to the wife, the wife can not by pleading that she was a married woman at the time procure a rescission, nor can the husband and others who signed the purchase-money note escape liability on account of the married woman's connection with the sale.

Mills v. Chelf, 8 Ky. Opin. 504.

(D) TRADE OR BUSINESS.

§ 92. Statutory provisions.

The legislature has power to make provision for the relief of married women from the disability of coverture.

Gamble & Firth v. Dunnegan, 7 Ky. Opin. 698.

If a married woman desires to secure the fruits of her own labor or accumulations, she must in conjunction with her husband pursue the mode pointed out by the statute authorizing her to trade as feme sole.

Strowd v. Stanley & Son, 8 Ky. Opin. 625.

§ 95. Proceedings to become sole trader.

A proceeding in equity by a married woman to authorize her to act as a feme sole is void, where the husband was not a party to the suit.

Canfield v. Labor, 7 Ky. Opin. 184.

§ 97. Married women as partners.

A married woman, who has not been empowered to act as a feme sole, has no power to form a partnership with others.

Mitchell v. Bailey & Co., 8 Ky. Opin. 774.

V. WIFE'S SEPARATE ESTATE.

(A) WHAT CONSTITUTES.

§ 110. Nature of equitable or statutory estate.

The husband being insolvent when he married, and the wife then owning three slaves, two of whom were sold and the proceeds invested in land and conveyance taken to the wife, by agreement, the wife's equity is equal to that of the creditor of the husband, notwithstanding she was clothed with the legal title.

Wilson v. Duncan, 1 Ky. Opin. 580.

A separate estate is that to which a married woman has the sole and exclusive right, independent of her husband, not subjected by his control or affected by any interest or use in him.

Thompson v. McCloskey, 12 Ky. Opin. 80.

It is not the right to the present use and enjoyment of property that determines a separate estate, but it may be created and exist without reference to the quantity of interest in the property or the time of its enjoyment, and it is sufficient if the feme covert has the sole and exclusive right to the estate devised or con-

veyed, independent of any control or interest of her husband, whether for life, in remainder, or absolute fee.

Thompson v. McCloskey, 12 Ky. Opin. 80.

§ 111. Married women's property acts.

By Act 1867-8, vol. 1, p. 5, § 1, relating to the power of married women to alienate their separate estates, the legislature intended to relieve married women from any greater disability in regard to the sale of their separate estates than is imposed on them with regard to their general estates.

McCarty v. Johnson, 6 Ky. Opin. 236.

§ 116. Gifts to wife.

Property given to a wife before her marriage, without restriction or limitation, cannot, after marriage, be converted, by the donor, into her separate estate, to the prejudice of her husband's creditors.

Brown & Co. v. Arnold & Co., 5 Ky. Opin. 236.

The husband cannot invest his wife with a separate estate in his own property, even in the proceeds of her own labor, to the prejudice of his creditors, but it may be done with the consent of the creditor, and in that event he is estopped by his own act to coerce payment of his debt out of the wife's separate property.

McDonald's Trustee v. Hayman, 5 Ky. Opin. 116.

A chose in action devised to the wife during coverture belongs absolutely to the husband, whether reduced to possession before or after the death of the wife.

Twyman v. Cross, 10 Ky. Opin. 570.

§ 117. Property devised or bequeathed to wife.

Where a wife agrees with her husband that he might receive and use the money coming to her under her father's will, on condition that it was to be used at a future time in paying for a designated tract of land, in which she was to be interested to the extent of such payment; but the father left a will giving said desig-

nated land to the husband, burdened with the stipulation that he should pay \$60 per acre into the general fund of the estate; and the husband received from his wife \$4,000 coming from her father's estate, and some years thereafter the husband made a deed to this land, in which his wife did not join, to a trustee for the payment of debts, reserving homestead, dower and the interest of his wife to the extent of the \$4,000, advanced by her, and there was no agreement that the husband would convey to the wife any interest in the land, it was held that the wife could claim nothing more than to be a creditor of her husband to the extent of \$4,000, and that she took no interest in the land as against his creditors.

Coons v. Coons' Assignee, 10 Ky. Opin. 595.

§ 118. Property inherited by wife.

Land received by a wife by descent from her father is not subject to the payment of her husband's debts.

Jones v. Boone, 7 Ky. Opin. 287.

The wife has a right to claim a settlement out of estate descended to her, and may assert it by original bill at any time before it is reduced to actual possession by the husband.

Graves v. Harris, 8 Ky. Opin. 682.

The wife has a right to allow her interest in a decedent's estate to be applied to pay her husband's debt, and may go into a court of equity and have that interest settled upon her and thereby free it from the control of her husband and terminate his right to reduce it to possession and thus remove it beyond the reach of his creditors.

Graves v. Harris, 8 Ky. Opin. 682.

Where a husband during his life did not reduce his wife's property to possession, but in pursuance to an agreement between them he disclaimed ownership and treated the property she received from her father's estate as her separate estate and never used or controlled it for his own benefit, after his death such property will be regarded as he regarded and treated it, and it will remain as the separate property of the wife; and this is clear-

ly so when there is sufficient property left by the husband to pay all creditors.

McConnell v. McConnell's Heirs, 12 Ky. Opin. 93.

Where a man buys real estate, receiving a bond for a deed from his father-in-law, the consideration being \$30,000, and after he has paid thereunder \$13,000, the father-in-law dies, and the estate descends to his children, one of whom is the purchaser's wife, such purchaser has no power to divest his wife of her interest in the estate by crediting his purchase-money notes with the value of her interest.

Litsey v. Phelps, 12 Ky. Opin. 383.

§ 119. Property conveyed to or for use of wife.

A conveyance to a married woman, her heirs and assigns forever, free from the use and control of her said husband, where the warranty is in the same words, is sufficient to create a separate estate.

Thomas v. Rowlett, 8 Ky. Opin. 578.

Where a husband makes a deed to his wife for the consideration of one dollar and love and affection he is not entitled, upon obtaining a divorce, to have the land so conveyed restored to him.

Whaley v. Taylor, 9 Ky. Opin. 742.

There is nothing in the statutes forbidding the creation of a separate estate with the authority to mortgage it, as well as to alienate it absolutely, and such a power may by the instrument creating the separate estate be lawfully annexed to the estate, and a married woman may be empowered with authority to mortgage, although the statute does not allow her to do so without such power is given by the instrument under which she holds.

Norris v. Cromie, 12 Ky. Opin. 612.

§ 120. Property acquired by husband in trust for wife.

Where a husband had possession of his wife's money, either as a loan or for the purpose of paying it on the purchase-price of land bought by him, and it was used in partnership busi-

ness in which the husband was interested, and the wife's conduct was free from fraud, and she got possession of the money by as meritorious means as did the partnership, a court of equity will not disturb her possession thereof.

Hambrick v. Gowan, 7 Ky. Opin. 621.

Where the wife at the time of her marriage was the owner of real estate inherited from her father, and after marriage her husband induced her to sell the land for reinvestment, the proceeds being invested in other land, to which the husband took title under agreement that if he died first he would arrange by will or otherwise that she should become the owner of the land, and the husband died suddenly without securing the property to her, a court of equity will enforce the agreement to secure the wife in her right to the property.

Burton v. Burton, 5 Ky. Opin. 240.

A husband becomes vested with an interest in the money of his wife in the hands of an executor, and where the money, with the consent of the wife, was placed by the husband in the hands of a trustee for their joint benefit, a trust is created by the husband for the benefit of the wife, and not by the wife for the benefit of the husband.

Hopewell v. Hopewell, 6 Ky. Opin. 455.

§ 121. Property purchased with wife's money.

Where a husband has used his wife's money to buy real estate, equity may be resorted to by the wife to require the land to be conveyed to her, but as against the vendor to whom such money has been paid she is not entitled to relief.

Jouett v. Owens, 10 Ky. Opin. 432.

§ 125. Rents and profits of separate property.

Whether, under the statute, the death of the husband invests the wife with the right to collect and appropriate the rents accruing on an unexpired lease of the wife's land, or whether the right passes to the personal representative of the husband,

is a question on which the court was equally divided.

Herrick v. Herrick, 7 Ky. Opin. 588.

§ 126. Earnings of wife.

The husband is entitled to the earnings of his wife and to the products of her lands, in the absence of any antenuptial contracts.

Petree v. Terry, 8 Ky. Opin. 269.

The savings of a wife may, with the consent of her husband, be applied to her separate use, and she may retain them as her own so far as regards her husband or his representatives after his death, but such claims of the wife can not be enforced against the husband's creditors.

Field v. Field's Admr., 10 Ky. Opin. 450.

The husband has no power, by his express agreement to that effect, to convert into a separate estate his wife's profits in business or her earnings, to be enjoyed by her to his exclusion, since only a court of chancery and the husband's consent thereto can effect such purpose.

Brown v. Casbier, 11 Ky. Opin. 459.

§ 129. Estoppel to claim property.

Where, in a suit by a husband holding property in trust for his wife and children, the wife answered, upon private examination, and consented to the sale, she can not afterwards disregard the sale and recover the property.

Sinnett v. Haynes, 7 Ky. Opin. 637.

Where a married woman owning real estate sells it, her husband joining her in its conveyance, the wife agreeing that the vendee shall pay a debt of her husband as a part of the consideration, and he either pays such debt or obligates himself to pay it, she is estopped to set up a claim against the vendee for such part of said purchase-money, as a married woman must do equity before she is entitled to a favorable consideration in a court of equity.

Brashear v. Moran, 10 Ky. Opin. 892.

§ 130. Evidence as to ownership.**§ 132.—Admissibility.**

Where it does not appear that a married woman's title to real estate is evidenced by any writing, it is not error to permit her husband to testify that the property belonged to his wife; and, where the title to real estate is not in issue, it is competent to prove it by parol.

Helm v. Spence, 10 Ky. Opin. 610.

(B) RIGHTS AND LIABILITIES OF HUSBAND.**§ 134. Vested rights.**

A husband can not, without the consent of his wife, evidenced as prescribed by law, pass her title to realty, nor destroy her right of retainer she holds upon the legal title to her land, to secure the payment of the purchase price.

McGowan v. Burton, 4 Ky. Opin. 407.

As a husband has no power to make a sale of the wife's land, his creditors or trustee could not enforce a parol sale made by him, as they would stand in no better attitude than the debtor.

Epperson v. Murrah, 3 Ky. Opin. 309.

A lease for years is only a chattel, and although in the wife's name, not being expressly stated to be for her separate use, is as much the property of her husband as any other chattel acquired in her name.

Myers v. Marcus, 10 Ky. Opin. 887.

§ 136. Right of possession or occupation.

As the husband has the joint use of the wife's property during their lives, his estate only is chargeable with interest on the use of personal property of the wife after his death.

Guthrie's Admr. v. Guthrie, 2 Ky. Opin. 644.

Under a written agreement between husband and wife, that she retain the right to hire out her personal property or keep same as she may think proper, should she decide to keep same for the family use, the law will imply no contract on the part of the hus-

band to pay hire during their joint lives.

Pendleton's Admr. v. Lawson, 2 Ky. Opin. 466.

The husband has no right to money paid his wife as the value of her right of dower by the judgment of the court, and when he is required to pay his wife money in and during the pendency of a divorce suit between them, he can not recoup such payment by being allowed to take money paid to his wife as dower when his land at the suit of creditors is sold.

Salter v. Salter, 9 Ky. Opin. 89.

A husband may at any time exercise his marital right to reduce to possession the estate he has permitted and assisted his wife to acquire, and where she dies first he takes it as survivor, notwithstanding it had been his intention that she should hold, own and control it at her discretion; but where he does not exercise this right and has no creditors, after his death his personal representatives can not defeat his intention and wish by making an election and exercising a right which vested in the husband alone, and which, from its personal character, could not survive his death.

Woodward v. Middleton, 9 Ky. Opin. 546.

The chancellor has no power after the husband has exercised his marital right and reduced his wife's money to possession, and thereby made it his own, to divest him of his title for the benefit of the wife.

Brownfield v. Cookby, 9 Ky. Opin. 658.

So long as the wife's choses-in-action have not been actually reduced to possession the husband may waive his marital right, and agree with his wife that it shall, when received, be held for her separate use, and such an agreement will be upheld and enforced.

Mitchell v. Hill, 9 Ky. Opin. 696.

When a husband, before reducing the wife's choses to possession, promises her to invest the proceeds in her name, he must be held to receive such

proceeds in trust and not in his own right.

Kimberlin v. Kimberlin, 9 Ky. Opin. 864.

§ 137. Power to manage or control.

Where a husband, without opposition on the part of the wife, transferred the possession of a house and lot to another as tenant, the wife can not assert her rights in a controversy between the landlord and tenant, relating solely to the tenancy and in no wise affecting the title to the other part of the property.

Kennedy v. Collins, 6 Ky. Opin. 157.

Where the husband rents the wife's real estate for not more than three years at a time and receives the rent in goods, the receipt of such goods pays the rent whether the wife consents thereto or not.

Finley v. Russell, 8 Ky. Opin. 36.

Under the statutes, the husband has the power to rent the wife's land for not more than three years at a time and receive the rent, and he may mortgage the crops on such land resulting from his own labor.

Strowd v. Stanley & Son, 8 Ky. Opin. 625.

The husband has a right to execute a lease of his wife's real estate for a period of three years, if the lease is made in good faith, but where made only a day or two before the wife's death, not in good faith but as a mere device to defeat the right of the wife's heirs to possession for a period of three years, it is void because fraudulent.

Dedman v. Priest, 9 Ky. Opin. 853.

A husband may use the money derived by him from his wife in paying his own debts or in purchasing property for his own use, and where the wife consents to such acts she will be denied relief therefrom.

Jouett v. Owens, 10 Ky. Opin. 432.

One holding a note of \$800 and a lien on the land of a married woman as security, (where the claim is questioned) who makes a compromise with the husband for the benefit of the married woman, by which the claim is re-

duced \$300, and he accepts in compromise the note of another for the balance, can not thereafter disregard the compromise and recover on his \$800 claim, since a lien thus abandoned can not be enforced.

Collins v. Richart, 12 Ky. Opin. 470.

§ 138. Authority as wife's agent or attorney.

Where it is conceded that the husband's power to purchase land for his wife was restricted to her ratification and approval, and that she had neither ratified nor approved the purchase, nor accepted the conveyance, the fact that the deed had been recorded does not conclude her, but she may still raise an issue of fact as to whether or not she accepted it.

Martin v. Allen, 5 Ky. Opin. 105.

Where there is no process served on the wife, the husband has no power to consent to a judgment against her, to subject her property to sale.

Cord v. Reeves & Co., 4 Ky. Opin. 694.

Where a husband, acting as agent of his wife invests her money in real estate, but without her knowledge or permission takes the title in the name of their daughter, reserving life estate for himself and wife therein, and no rights of creditors are involved, it is not too late for the wife to sue to set aside such deed and have the title conveyed to her, even when the action is brought nearly twelve years after she discovers the fact that the title was not conveyed to her.

Terry v. Hill, 12 Ky. Opin. 468.

§ 139. Right to proceeds of sales.

Where it is not shown that a husband received money arising from the sale of his wife's property, under an agreement to invest it for her benefit, or that he received it under such an agreement with any one, it is held that it became his absolutely, since he received it without such agreement.

Sinclair's Admrs. v. Sinclair, 10 Ky. Opin. 441.

§ 141. Improvements by husband.

The declaration of a wife that she is willing that her husband shall be reimbursed for improvements made on

her land, by "sale of stock or otherwise," is not sufficient to charge her realty upon divorce of the husband and wife.

Herrick v. Herrick, 7 Ky. Opin. 527.

Where a husband voluntarily makes improvements on the land of his wife not in pursuance of any antenuptial agreement or in expectation of being reimbursed through his right to hold and enjoy the wife's land, such expenditure does not come within § 6, art. 3, ch. 47, R. S., or § 462, Civ. Code Prac., and he is not entitled to a lien for the improvements made upon divorce from his wife.

Herrick v. Herrick, 7 Ky. Opin. 527.

Where at the time the improvements were commenced the legal title was in the husband, who retained it until after the greater part of the materials and the most of the work had been done, a conveyance to the wife could not defeat the lien.

Cress v. Montgomery & Co., 5 Ky. Opin. 154.

Where the wife knows of the insolvency of her husband, and knows he is using money due his creditors to improve her real estate, she is held to have participated in the fraud; and while she can not be deprived of her title secured before insolvency, the court will cause the rents of such property to be applied upon creditors' claims.

Henry & Co. v. Bennett, 8 Ky. Opin. 57.

An insolvent debtor may not take funds due his creditors and improve his wife's real estate.

Henry & Co. v. Bennett, 8 Ky. Opin. 57.

Where a husband who is heavily in debt by the expenditure of his own money and credit, improves his wife's real estate by the erection of a building thereon, his creditors may subject the value added to the property by the husband to make assets to pay their claims, since such an investment of the husband's means is a fraud against

creditors, especially when the wife knows all the facts and permits it.

Barbour v. Gaines, 12 Ky. Opin. 448.

§ 144. Accountability for property and income.

If chattels are sold to the wife by a third person for her separate use and come to the possession of the husband, the legal title vests in him, and he will hold them as trustee for the wife.

McLure v. Wolfe, 8 Ky. Opin. 315.

(C) LIABILITIES AND CHARGES.

§ 149. Rights of husband's creditors.

Money received by wife, and by her put into the possession of her husband, became his, and was liable for his debts.

Randall's Admr. v. Moore, 7 Ky. Opin. 680.

The separate debts of a wife are not liable for the debts of her husband.

Marshall v. Roach, 4 Ky. Opin. 413.

The court will not interfere after the death of both husband and wife to apply the proceeds of property belonging to the wife to the payment of the husband's debts.

Broyles v. Moffet's Admr., 6 Ky. Opin. 388.

A creditor can not apply the proceeds of a note owned by debtor's wife to the husband's debts, and then look to the wife for payment of such amount on her debt.

Gatewood v. Duff, 6 Ky. Opin. 244.

A wife is not liable for money borrowed by her husband, unless a case is made such as will authorize a court of equity to subject her estate to the payment of the husband's debts.

Jones v. Hudson, 6 Ky. Opin. 188.

If the wife's money is borrowed of her or of her husband acting as her agent, the borrower can not afterward be heard to say that the money belonged to the husband, nor can he be allowed to credit the same on the husband's indebtedness to him.

Finley v. Russell, 8 Ky. Opin. 36.

Marriage invests the husband with absolute title to all the chattels of the wife not held as separate estate whether owned at the time of or acquired after marriage, and where goods are bought in the name of the wife and paid for with her money, yet at the time she had not been empowered to hold property or to trade as a feme sole, the title vested in her husband, and was subject to be seized to pay his debts.

McLure v. Wolfe, 8 Ky. Opin. 315.

A wife's general estate is not liable for the debts of the husband, but is liable for those of the wife incurred before marriage, and for those contracted after marriage on account of the purchase of necessities for herself or any member of her family, her husband included, as shall be evidenced by writing signed by herself and husband.

Drake v. Bradley, 8 Ky. Opin. 426.

Where a husband after marriage took possession of his wife's money and agreed with her to invest it in lands for her benefit, but bought lands taking title in his own name, and after many years mortgaged it to creditors, the wife's claim is subordinate to the claim of creditors who loaned their money to the husband without any knowledge of the secret claim of the wife.

Shanks v. Pitman, 8 Ky. Opin. 514.

Secret transactions between husband and wife, when the wife is not authorized to trade as a feme sole, are not to be regarded with favor nor allowed to defeat the husband's creditors.

Strowd v. Stanley & Son, 8 Ky. Opin. 625.

A voluntary conveyance to the wife will not defeat a creditor who took a mortgage from the husband after such conveyance to secure a debt created before the conveyance was made.

Kinser v. Robertson, 8 Ky. Opin. 626.

Where a man conveys his real estate to a woman in consideration of marriage and the marriage is consummated, his creditors can not subject

the land to sale to pay the grantor's debts.

Waller's Admr. v. Harrison, 8 Ky. Opin. 717.

Where the wife's property is invested in lands but conveyed to the husband, he is liable to her as between themselves, but this will not prevent creditors from subjecting such lands to the payment of their debts, and the wife's rights are postponed to those of his creditors.

Young v. Nesbitt, 8 Ky. Opin. 730.

Where the wife's father gave her money with which to buy land and she kept the money until the day of the purchase, and then gave it to her husband to pay for the land, and he promised to have the deed made in her name, but instead took it in his own name, her right to the property is superior both in law and equity to the claims of those who have credited the husband.

Ragan, Dickey & Ragan v. Higgins, 9 Ky. Opin. 25.

Where the husband is the owner in fee of real estate, and procures from his wife some of the means with which he pays some of the purchase money, the wife can assert no claim as against creditors of the husband who became such on the strength of such ownership and without knowledge of any claim of the wife.

Jones v. Jones' Trustees, 9 Ky. Opin. 707.

Where the husband buys lands while the wife's money is still in the hands of the administrator and still subject to her right of settlement, and he agrees with or promises her to use her money to pay for the land and have it conveyed to her, her equity in the land is superior to the equity of her husband's creditors.

Kimberlin v. Kimberlin, 9 Ky. Opin. 864.

Where a woman owns a store, and an antenuptial contract provides that it shall remain her property, and such store is conducted after marriage, the earnings of the wife under such a contract from the conduct of said store, as between her and her husband's creditors, can be subjected to the debts of the husband; and the equity

of the wife can only extend to the value of the stock on hand at the time of the antenuptial contract.

Trigg v. Bemis, 9 Ky. Opin. 492.

Where the wife undertakes to trade as a feme sole under an antenuptial contract, her services, or rather the profits made by her, are subject to the claims of her husband's creditors.

Trigg v. Bemis, 9 Ky. Opin. 492.

The wife's property, being the proceeds of her labor or the result of her business transactions, is liable for the husband's debts; and the only way a separate estate may be created in the wife so as to permit her to carry on a trade or use profits in her own right is to follow the steps provided by the act of 1866.

Robinson v. Winn, 9 Ky. Opin. 542.

Where a husband, being indebted, voluntarily conveys his real estate to his wife for no other consideration than love and affection, his creditors have the right to subject such real estate to the payment of their claims.

Stewart v. Troutman's Admr., 9 Ky. Opin. 590.

A wife may hold a freehold or an estate of inheritance against her husband's creditors, but a husband is entitled to the wife's chattels, unless they are the separate property of the wife.

Long v. Simpson & Grechrist, 10 Ky. Opin. 80.

It is only when the legal right of the husband has not been perfected that the court can intervene to protect the wife against the claim of his creditors; but a husband, by reason of his marriage, has a right to the use of his wife's land, and when they reside on the land and cultivate it he has a legal right to the produce of the farm, and such property is subject to the claims of his creditors.

Trimble v. Redman, 10 Ky. Opin. 557.

Where a husband desired to purchase a tract of land, and it was agreed between himself, his wife and his wife's father that in consideration of the wife receiving conveyance of

one hundred acres thereof, her father would pay her five hundred dollars, to be used in making the purchase, and the purchase is made by the husband, who pays for the land except the five hundred given by the wife, and takes the land in his and his wife's name, but afterward conveys to the wife the one hundred acres, such land can not be made subject to the husband's debts incurred after the purchase, but before the conveyance to the wife, especially where such creditors knew the wife was claiming the land.

Button v. Biggers, 10 Ky. Opin. 568.

Where the rent distrained for was for the use of the wife's property, such property could not be subjected to her husband's debt.

Helm v. Spence, 10 Ky. Opin. 610.

The creditors of a husband are not injured by the wife's purchasing a store with money that can not be subjected to the payment of the husband's debts, since a married woman may invest the proceeds of the homestead for her separate use with the consent of the husband, and with an action then pending enabling her to trade as a feme sole.

Fleckham v. Black, 10 Ky. Opin. 652.

Where a wife owning real estate joins her husband in its sale and conveyance, and he receives the proceeds, invests it in personal property and is permitted to use, trade and sell the property, the wife can not assert ownership in such property as against the husband's creditors.

Padgett v. Kimbrough, 10 Ky. Opin. 746.

Where real estate is purchased with the wife's money, but conveyance is made to the husband, the wife can have no claim on such property as against the husband's creditors.

Darnaby v. Darnaby's Assignee, 10 Ky. Opin. 850.

Where land is purchased by the husband for the wife and conveyed to the wife before the creation of a debt of the husband, such creditor can have no claim on such debt against such land.

Owens v. Ford, 11 Ky. Opin. 451.

Where in a petition it is shown that land was purchased with the wife's money and by mistake the conveyance was made to the husband, and the exhibits filed with the petition show that such deed had been made more than twenty years and that the husband had deeded portions of it as if no mistake had been made and without any objections by the wife, the rights of the husband's creditors, which became certain by the levy on the land, are superior to the stale equity of the wife unsupported by the allegations of any specific facts showing that the money paid for the land was hers.

Marshall v. VanMeter, 11 Ky. Opin. 491.

Where a contract between a husband and his wife is executory merely the wife's claim must yield to the creditors; but where it is executed in good faith by reason of the prior agreement and before the creditors have seized the property by execution, attachment or otherwise, the wife's claim prevails.

Devon v. Kobigen, 11 Ky. Opin. 882.

Mere acquiescence by a married woman during her coverture in a sale by her husband of her real estate, is not sufficient to enable the purchaser to resist her recovery of the land after the death of the husband.

Cavender v. Graves, 11 Ky. Opin. 937.

Where land is paid for with money belonging to the wife originally, which money the husband had not reduced to possession, such land can not be subjected to pay the husband's creditors.

Byers v. Prewitt, 12 Ky. Opin. 160.

The husband has the right to reduce the chose in action of the wife to his possession and to sue thereon in his name and that of his wife, and he will own the money recovered in such an action; but when he so sues and recovers and is paid, but on appeal the judgment is reversed, and he becomes liable to return the money, but is insolvent, such money can not be recov-

ered from the wife who received none of it.

Spratt v. Hugart, 12 Ky. Opin. 330.

Where a husband is insolvent, and yet as agent of his wife who is solvent he trades in real estate with her money, giving up all of his time to the business, and without the knowledge of his wife takes real estate in his own and his wife's names jointly, his undivided interest in such land is liable for a judgment taken against him prior to his receiving such interest by conveyance.

Robinson v. Anderson, 12 Ky. Opin. 539.

Where real estate is purchased and the title taken in the wife's name, if the husband paid a part of the purchase-money, his creditors are entitled to subject his proportionate interest to their demands.

Simpkinson & Co. v. Pierce, 12 Ky. Opin. 542.

Where a wife receives some personal estate from her father, but her husband reduced the same to his possession, he can not defeat his creditors by paying the same over to his wife.

Hall v. McGlothlin, 13 Ky. Opin. 312.

Where a wife buys real estate at sheriff's sale, taking title in her own name, still such land is liable to be subjected by the husband's creditors, where it is shown that the wife paid nothing for the land but that it was paid for by the husband.

Ams v. First Nat. Bank of Owensboro, 13 Ky. Opin. 672.

A husband can not by secret gift transfer to his wife his personal property, the possession and use of which remains with him as the head of the family, so as to vest the title in her as separate estate free from his marital rights or the claims of his creditors.

Brinkley v. Hughes, 13 Ky. Opin. 695.

Where a wife's money is invested in land by her husband, who takes the title in his own name contrary to his agreement with his wife, and the land is sold and other land purchased, the

title being taken in the same way, the husband concealing such fact from the wife, she can not be said to have been guilty of laches by which a creditor of her husband was misled, and where the land is conveyed to the wife before the creditor sued the husband the conveyance will not be set aside.

Carrick's Admr. v. Cochran, 13 Ky. Opin. 777.

Where the wife furnishes money to her husband to be used in paying for land, and the title is taken in the husband's name, and the wife sets up a claim to a part of the land, she can recover neither the money nor land, when the evidence shows that after the purchase of the land she and her husband conveyed one-half interest therein to her son, who is a stepson of her husband, it fairly appearing that the one-half interest was about worth what money the wife furnished her husband.

Powers v. Comey's Admx., 13 Ky. Opin. 897.

Where there is no agreement between a husband and wife that title to real estate shall be taken in her name, the fact that her labors helped to make the money, and that some of her money went into the land, will not enable her to assert an interest therein as against her husband's creditors.

Herferth v. Zimmerman, 13 Ky. Opin. 992.

Where a wife, the owner of personal property, entrusts it to her husband under a secret trust, to sell it and use the money to purchase real estate, to be taken in her name, and the husband buys real estate, taking title in his own name, the wife may not assert such secret trust to defeat her husband's creditors who trusted him by reason of his apparent ownership of such property, as the equity of the wife in such case is not superior to that of such creditors.

Hunt v. Fish, 13 Ky. Opin. 933.

§ 150. Improvements and materials furnished.

The husband may put such improvements on his wife's property as will make it reasonably safe for occupancy by himself and family, without such

improvements being subject to his debts.

Rice v. Johnson, 2 Ky. Opin. 158.

Where a husband buys a lot which is paid for by his wife, and a building is erected by him on the lot, the chancellor will not, upon the application of the husband, incumber the property with a lien in behalf of the husband who has already used and expended the greater part of his wife's estate.

Marcum v. Marcum, 13 Ky. Opin. 600.

§ 151. Necessaries and family expenses.

Where a feme covert procured medical attention for her daughter, and the services were rendered on the credit of the mother, and she induced the doctor to continue his services for the daughter after the mother had become discoverd, the mother may be held liable for the services rendered.

Galliac v. Nugent, 7 Ky. Opin. 719.

Under the statute (2 R. S., p. 8), to bind a married woman's estate for necessities, it is essential that the credit originally should be given to her, and not to her husband alone.

Waller v. Johnson, 4 Ky. Opin. 308.

In an action to subject a married woman's estate for necessities, it is necessary to allege in the petition that the credit was originally given to her, for herself or family.

Waller v. Johnson, 4 Ky. Opin. 308.

An allegation in an action on a note given by a married woman for necessities, that she signed the note with the object and intent to charge her estate with the payment of the debt, or that the money "was borrowed for necessities, and used by the defendants," held insufficient to authorize the deduction that the wife borrowed the money for her own use, or for her family.

Waller v. Johnson, 4 Ky. Opin. 308.

The statute makes the estate of the wife liable for necessities furnished when evidenced by a writing signed by herself and husband, but no per-

sonal judgment can be rendered against her.

Payne v. Bayze, 5 Ky. Opin. 258.

The renting of property by a husband and wife does not in law or equity make the wife responsible for the rent, and her separate estate cannot be subjected to the payment of her husband's debts.

McDonald's Trustee v. Hayman, 5 Ky. Opin. 116.

Where goods are purchased on the wife's credit by the husband and were necessities for the family, the estate of the wife may be subjected to pay for them.

Dorsey v. Sears, 8 Ky. Opin. 605.

Where the wife holds a general estate in lands, and debts were contracted after her marriage on account of necessities for herself and family, her husband included, where the contracts for necessities were not signed by her or made by her, and the credit was not given to her, but to her husband, her general estate is not liable for such debts.

Chiles v. Ready's Admr., 9 Ky. Opin. 51.

If a married woman buys articles not necessities for the family, but necessary to enable her to keep a hotel, such articles can not be deemed necessities within the meaning of the statute enabling married women to bind themselves for necessities.

Percival & Co. v. Grant, 9 Ky. Opin. 197.

Where the wife owns real estate and she obtains articles by purchase which are necessities for the family, the charge being made against her at the time, she is liable therefor, and the fact that a note is signed by her husband and herself, her name appearing under his, will not establish the claim that she is surety only for her husband.

Monahan v. Altenburg's Exrx, 9 Ky. Opin. 339.

Where the father of a married woman upon her death orders a burial outfit, and it is furnished and he is charged for the same, he can not, by

having the bill made out and presented to the husband of the deceased make such husband liable thereon to the undertaker, since such a claim is not the debt of the husband, unless he ordered the outfit or agreed to pay for it, and there can be no recovery against the husband in favor of the estate of the decedent's father where there is not in his petition any allegation that the husband promised to pay such claim.

Crofoot's Exr. v. Duval, 10 Ky. Opin. 806.

§ 156. Bills and notes.

Although appellee is one of the payors of the note, it does not appear that her separate estate was bound for the payment of the same, and as she was a feme covert at the time of its execution, it imposed no personal liability upon her, since F., by signing the note, became the surety of the husband and not the wife.

Field v. Porter, 4 Ky. Opin. 332.

The attempt to retain a lien in the conveyance to secure him on account of this note was an effort to create a charge upon the estate of a married woman, and appellee can not be compelled, on account of her acceptance of the deed, to pay the note.

Field v. Porter, 4 Ky. Opin. 332.

§ 157. Guaranty and suretyship.

A married woman can not bind herself by a contract of suretyship, and where she does not receive the consideration, but it goes to her husband or another, she may successfully plead that she is surety only and that she was, at the date of the contract sued upon, a married woman.

Casey v. Harwood, 13 Ky. Opin. 928.

§ 159.—Debts of husband.

Where the wife conveys her land as a security for her husband's debt, and the husband having paid the debt, the title re-vests in her as the owner, and hence one purchasing the land upon execution sale against the husband, the wife having died, acquires only the life estate which the husband held as tenant by the curtesy.

Overly v. Ring, 10 Ky. Opin. 264.

§ 161. Debts contracted on credit of separate estate.

A creditor can not recover against a wife for goods sold to the husband and daughter, without showing that the credit was given to her.

Wood v. Burris, 5 Ky. Opin. 325.

Where the credit is given to the wife and she joins with her husband in the execution of a note, a recovery may be had against her, especially where the husband is insolvent.

Howard v. Peters, 5 Ky. Opin. 369.

The separate estate of a married woman can not be subjected to the payment of her debts by an action ordinary, but can only be done by a proceeding in equity.

Glass v. Tevis, 11 Ky. Opin. 247.

§ 163. Debts charged on separate estate.**§ 164.—Intent to charge.**

A married woman may bind her separate estate for debts created for her own use and benefit, and she may do so by her express contract, or an implied one to be gathered from the use to whatever may be obtained under it is applied.

Casey v. Harwood, 13 Ky. Opin. 928.

§ 168. Mortgage or pledge.**§ 169.—In general.**

The power to sell the separate estate conferred by the statute upon the wife does not imply the power to mortgage such real estate for the debts of the husband.

City of Paducah v. Duke, 11 Ky. Opin. 46.

§ 171.—Debts of husband.

Land being general estate, the wife has no power, in conjunction with her husband, to bind it by mortgage to secure a debt of her husband.

Hurst v. Stone, 6 Ky. Opin. 129.

Where there is no fraud alleged or shown on the part of a husband and wife, and the evidence shows that the husband paid nothing to make the improvements on his wife's land, and all he contributed was his own labor, and the improvements made were necessary to prepare the land for a home for himself and wife, the land of the

wife is not subject to the husband's debts.

Cox v. Bishop, 11 Ky. Opin. 110.

Where parties contemplate charging the wife for money loaned to her husband, it will not be presumed that her separate property is charged with the debt, but that the credit was given upon her general estate, since the wife's separate estate is not liable for the debts of her husband in the absence of her agreement to become liable and to pay out of such estate.

Stuckey v. Bell, 11 Ky. Opin. 217.

A married woman may mortgage her general estate in land to secure her husband's debts. For evidence held sufficient to show that parties signed and acknowledged a mortgage, see opinion.

Birkhead v. Kyle, 13 Ky. Opin. 42.

(D) CONVEYANCES AND CONTRACTS TO CONVEY.**§ 179. Power of alienation in general.**

Where a deed from a woman to a man, among other things, recited that she was the lawful owner of the premises and "hath good right, full power, and lawful authority to sell and convey the same in manner and form aforesaid," it contains a general warranty to the grantee and his heirs, and to some extent repels the conclusion of the existence of the marriage relation between the grantor and the grantee.

Langdon v. Kirty, 7 Ky. Opin. 630.

A married woman of twenty-one years of age or older has the right to sell her interest in property descending to her, without a decree of court.

Calvert v. Pearce, 2 Ky. Opin. 335.

Where M's title to the land was perfect and complete, as the record shows, and the only question presented is, did J, the mother of appellees, divest herself of her title to her undivided interest in this land previous to her death, and a power of attorney signed by her was never acknowledged or recorded, she was incapacitated by reason of her coverture from

making any sale or conveyance of her land.

Joyce v. Monk, 4 Ky. Opin. 687.

Under Rev. Stat., ch. 47, art. 4, § 17, prohibiting a married woman from alienating her separate estate acquired by devise or conveyance, since she cannot transfer such estate, neither can she change its status by contracting debts.

Turner & McCreary v. Searcy, 4 Ky. Opin. 354.

§ 184. Consent of husband.

The residue of the land not paid for with the proceeds of the wife's land having been paid for by her husband and having procured that residue to be conveyed to her separate use, he must be regarded and is in fact her donor, and having joined his wife in the mortgage, he as donor has thereby consented to the same.

Carpenter v. Carpenter, 5 Ky. Opin. 755.

§ 186. Contracts to convey.

The bond of a married woman to convey is void, and after her death her heirs and next of kin can not be compelled to make a deed in pursuance of the agreement to convey by such married woman.

Cummings v. Hamilton, 13 Ky. Opin. 76.

§ 190. Conveyances in general.

A husband who acquiesces in the individual rights of the wife to her property, cannot afterwards claim an interest therein so as to exclude the rightful heirs.

Webster v. Bourne, 3 Ky. Opin. 167.

Where a husband acquiesces in the individual rights of his wife to her property, he cannot thereafter claim any interest therein, and his creditors have no better standing in relation thereto than he has.

Webster v. Bourne, 3 Ky. Opin. 167.

The attempted sale of the wife's land by her husband might have postponed, but could not have deprived, her of the ultimate use of her estate, if she has not been estopped by the

subsequent ratification and confirmation of the sale.

Morton v. Ford, 1 Ky. Opin. 160.

An acknowledged deed executed by husband and wife is ineffectual to pass title where signed by a feme covert, though the title of the husband, as tenant by curtesy of the deceased wife, would pass to the purchaser under the deed.

Bowman v. Vowells, 1 Ky. Opin. 65.

The mere surrender of a deed by a married woman does not divest her of her title to the land.

Smith v. Hardin, 1 Ky. Opin. 546.

A feme covert is not bound by an unrecorded deed, and the possession of land by a vendor under such is held not to be adverse to a feme covert.

McGruder v. Field, 2 Ky. Opin. 376.

An experimental sale of the lands upon which the wife has a lien for money paid by her on the purchase price, is held injudicious, where the value of the land is shown to be no more than the price paid by the wife for which she holds a lien, and would create inconveniences and oppressiveness in its cost.

Wright's Admr. v. Gillum, 2 Ky. Opin. 488.

§ 191.—Form and contents.

In order to pass title of a married woman, or to make a conveyance evidence against her, under the Act of March 9, 1854, it was required that the clerk before whom she acknowledged the deed should write out and sign the certificate, setting forth therein the facts, including the endorsement made thereon, and record the same within the proper time; and where no certificate is made by the clerk as appears on the face of the deed such a conveyance will not divest her of title.

Netherland v. Calvin, 10 Ky. Opin. 777.

§ 193.—Joinder of husband.

A married woman may, by joining with her husband, convey her real es-

tate, and retain a separate use in the proceeds of the sale.

McCarty v. Johnson, 6 Ky. Opin. 236.

A deed executed by a married woman without her husband joining is insufficient, and unless the plaintiff grantor files an amended petition and tenders therewith a good and sufficient deed, her petition should be dismissed.

Moore v. Graham, 6 Ky. Opin. 616.

A deed of a married woman is void where her husband does not join therein, and he has not theretofore conveyed, and the subsequent deed of the husband does not convey the wife's interest.

Sandifer v. Hardin, 10 Ky. Opin. 958.

§ 195.—Construction and operation.

Where a wife joins with her husband in the execution of a deed to her land, and is named in the body of the deed as one of the grantors, and the deed purports to be and is a sale by her of her own land, the deed conveys all her interest; and a statement at the end of the deed that she relinquishes her right of dower, which had no existence, will not invalidate the deed.

Beverly v. Noel, 12 Ky. Opin. 120.

Where the wife owns the fee-simple title to real estate and the husband and wife join in a conveyance, the granting part of the deed passing the fee, and at the concluding part the wife relinquished her dower, and she has no dower to relinquish, it is held the wife's fee passes by the deed.

Clarkson v. Allison, 12 Ky. Opin. 177.

§ 197. Parol transfers.

There is no principle of law or equity that prevents the wife from changing by parol, the nature and character of her separate estate, and vesting husband with absolute title.

Allen v. McGrath, 5 Ky. Opin. 12.

§ 198. Estoppel to assert invalidity.

Where a wife permits her husband, with her own knowledge and consent, to use her money for his own purpose

and to announce to his creditors and customers by his public advertisements and in the sale of his goods that he was the owner of the establishment, she thereby deprives herself of the right to assert her claim to the property as against his creditors.

Allen v. McGrath, 5 Ky. Opin. 12.

When a married woman over twenty-one years of age sells an inheritance, by order of court, without a reinvestment thereof, the fund to be placed under the control of her husband, without bond, she will be estopped from attacking the sale thereafter, especially when she has joined her husband in a subsequent confirmation of the title.

Calvert v. Pearce, 2 Ky. Opin. 335.

Where, after the second husband possessed himself of his wife's money he purchased other land with it and took the deed to himself, and it recited that he paid the consideration, showing that he had appropriated the money and made the purchase to his own account; after the contract was thus completed and acquiesced in for more than twenty years, parol proof of admission by the husband that he had purchased the land for his wife, and setting up a resulting trust, is inadmissible, as such evidence is inconsistent with the deed, and, if permitted to prevail, would violate the statute of frauds.

Francis v. Rice, 4 Ky. Opin. 201.

§ 199. Ratification.

Though a conveyance made by a husband and wife, be ineffectual to pass her title, her prosecution of the action after her disability of coverture was removed, is a confirmation of the contract.

Nesler's Admr. v. Smith, 4 Ky. Opin. 282.

Upon acquiescence in a parol exchange of lands by the wife, upon a rescission, she will be held liable for improvements made by her vendee, though she had given no authority for the original exchange.

Epperson v. Murrah, 3 Ky. Opin. 309.

VI. ACTIONS.

§ 203. Capacity to sue and be sued in general.

Under Civ. Code, § 51, where a husband and father has deserted his wife and children, the wife may prosecute or defend in his name any action which he might have prosecuted or defended, and she will have the same right therein as he would have had.

Foster v. Murphy, 7 Ky. Opin. 454.

During the life of her husband a woman is under disability to assert her rights by suit, and the law which disables her to sue can not require her to give notice of her claim on pain of losing her right through the operation of an estoppel.

Collins v. Gardner, 10 Ky. Opin. 346.

§ 205. Rights of action between husband and wife.

Where a husband is entitled to the use and possession of a farm belonging to his wife, and where such farm was charged with an annual payment of rent, which the wife was forced to pay, she may set off such amount against the claim of her husband assigned to another, because of his having been deprived of the use of such farm.

Herrick v. Herrick, 9 Ky. Opin. 713.

§ 206. Rights of action by husband or wife or both.**§ 207.—In general.**

A wife was held not to show a right to prosecute an action in the name of her husband under § 51, Code of Civ. Prac.

Arosmith v. Plummer, 6 Ky. Opin. 443.

Where the husband has abandoned his wife, she has the right to sue in the husband's name, and at the instance of the wife the chancellor will interpose to prevent a creditor of the husband from depriving the family of the homestead.

Warren v. Block, 10 Ky. Opin. 650.

§ 211. Rights of action against husband or wife or both.**§ 212.—In general.**

Where, in a suit to foreclose a mortgage against a husband and wife, who are both before the court and raise no question as to the wife's acknowledgment, it is too late, after judgment, to question the validity of the acknowledgment by the wife, as such a defense should have been made before judgment was rendered.

Cummins v. Forrest, 12 Ky. Opin. 596.

§ 213.—On contracts.

Where several married women were sued jointly with their husbands and others, and a joint personal judgment is rendered against all, such judgment is erroneous as to the married women, and since the judgment is joint it must be reversed as to all.

Clark v. Tucker, 8 Ky. Opin. 409.

§ 217. Defenses by husband or wife.

Payment by a father for necessities for the family of his daughter out of funds placed in his hands by her husband, is not a good defense to an action for recovery of the amount by the daughter's husband.

Hull v. Evans, 2 Ky. Opin. 538.

While a married woman may plead coverture in her own behalf, such disability can not avail her adversaries who were themselves under no disability.

Huffstetter v. Moore, 8 Ky. Opin. 286.

§ 220. Time to sue and limitations.

The statute of limitation does not begin to run against a married woman until she becomes discoverd.

McGruder v. Field, 2 Ky. Opin. 376.

§ 221. Parties.

A wife can not sue to enforce a contract made by her with the defendants, without joining the husband as plaintiff or making him a party defendant.

Canfield v. Labor, 7 Ky. Opin. 184.

The husband is a necessary party to a proceeding by his wife to enforce her contract.

Main v. Carter, 3 Ky. Opin. 393.

The wife can not sue for an injury to her husband's property simply because it is in her manual possession, and she is not a proper party in such an action.

Brown v. Casbier, 11 Ky. Opin. 459.

Where the record on appeal shows that the wife had an interest in certain real estate sought to be subjected to the payment of her husband's debts, she is a necessary and proper party to the action; and where she is not made a party it is not error for the court to dismiss the action as to such land.

Ballard v. Franklin, 11 Ky. Opin. 473.

§ 228. Pleading.

An allegation by a wife that she was driven to the signing of the mortgage by her husband, against her consent, is equivalent to alleging that she did not act freely and voluntarily in executing the instrument.

Bradley's Exrs. v. Lyles, 7 Ky. Opin. 462.

It is erroneous to adjudge, by default, against a feme covert on an executory contract to purchase land, without averring in the petition that she had a separate estate, or that the purchase was necessary for herself and family.

Harcourt v. Baxter, 3 Ky. Opin. 603.

It being not alleged that the money which the wife professes to have invested in the property in controversy was her separate estate, nor by what authority she held it free from the rights and control of her husband, she had no rights to the proceeds.

Flanagan v. Thurman, 3 Ky. Opin. 389.

In an action on the joint note of a husband and wife, it devolves on the party seeking to charge the wife's estate therewith, to repel the presumption that the debt is that of the hus-

band alone, by a direct averment of the necessary statutory facts to bind the wife.

Waller v. Johnson, 4 Ky. Opin. 308.

An averment in an action to subject a wife's estate on necessities purchased, that her name was signed to the note in her absence impliedly negatives such authority.

Funk v. Mannister, 4 Ky. Opin. 204.

The denial that the alleged necessities were furnished at the wife's instance, or on her credit, is sufficient to bar the action for subjecting her estate, even if she authorized the signature of her name to the note.

Funk v. Mannister, 4 Ky. Opin. 204.

The denial that the alleged necessities were furnished at the wife's instance and on her credit, is sufficient to bar the action for subjecting her estate, unless she authorizes her name to be signed to the note given therefor.

Funk v. Mannister, 4 Ky. Opin. 204.

However anxious the court may be to sustain such a meritorious and proper investment made at the instance of the wife, as the answer of appellants alleges, still it cannot be done in the absence of all proof showing that the allegations of the answer are true and that such investment was made.

Reed v. Reed, 5 Ky. Opin. 409.

A petition in an action on a note alleged to have been given for necessities, which fails to allege that the goods were sold and furnished to the wife, or that credit was given to her and not to her husband, is insufficient as against the wife.

Gatewood v. Duff, 6 Ky. Opin. 244.

Where a husband, in suing to recover a debt contracted by defendant with plaintiff's wife prior to the plaintiff's marriage with her, fails to allege that any property came to his possession by virtue of the marriage, the

petition does not state a cause of action.

Moss v. Blain, 7 Ky. Opin. 563.

A petition on a note executed by a married woman and her husband seeking to subject her separate estate, is insufficient when it does not contain an allegation that she created the debt or that it was made for her use, or that she received the benefit of it. Such omissions, however, are cured by an amendment alleging that the land was conveyed to "the defendants"; that the money for the loan, for which the note sued on was given, was advanced and loaned to the defendant to protect her against her loss of her property and to enable her to live, and the petitioner is entitled to a judgment only in rem.

Hughes v. Nash, 13 Ky. Opin. 341.

§ 231. Evidence.

In an action on a note purchased by a married woman, the burden is on plaintiff to show what the consideration for the note was, that it was a necessity for the defendant's family, and that it was sold to him.

Russell v. Reynolds, 7 Ky. Opin. 416.

A married woman, to escape liability for an incumbrance of her estate by herself and husband, must show by proof, by an exhibition of her title to same, her separate estate.

Burkhead v. Stuart, 4 Ky. Opin. 375.

The burden is on one who seeks to apply notes executed to the wife to the payment of the husband's debts, to show that the notes were executed for property or money belonging to the estate of the husband.

Broyles v. Moffet's Admr., 6 Ky. Opin. 388.

§ 237. Judgment.

§ 238.—In general.

In a suit against a husband for antenuptial debts of the wife, judgment should not be rendered against him to be levied on the property in his hands received by or through the wife, since all the property of the husband sub-

ject to execution is liable within the limits fixed by the statute.

DeLand v. Blynn, 7 Ky. Opin. 635.

A judgment affecting the estate of a married woman, even for necessities, cannot be sustained without the written authority or objection prescribed by section 1, article 2, ch. 47, Rev. Statutes.

Davis' Admr. v. Gray, 3 Ky. Opin. 594.

A judgment against a wife, "to be levied or collected out of her general estate," is erroneous, since it should point out what property or interest of hers is subject to the debt and specially order it to be sold.

Thomas v. Seller & Co., 4 Ky. Opin. 101.

In an action against a husband and wife for debts incurred by the wife prior to their marriage, judgment may be rendered against them, but as to the husband, the judgment should only be levied upon the property which had come, or might have come, to him through the marriage.

Jones v. Cunningham, 6 Ky. Opin. 56.

A judgment in personam against a married woman on a note alleged to have been executed for necessities was held to be erroneous.

Gatewood v. Duff, 6 Ky. Opin. 244.

In an action against husband and wife, where the evidence shows that the wife merely acted as the agent of the husband, judgment can not be rendered against the wife, the husband alone being liable.

Ragacini v. Skilbeck, 6 Ky. Opin. 265.

Judgments against married women and infants, when they are before the court by virtue of process in cases over which the court has jurisdiction, are not void, but are binding, though erroneous, until reversed; but such married women or infants; but such from such judgments within one year after the removal of the disability.

Witt v. Willison, 8 Ky. Opin. 607.

Where a wife is a party to a suit in which it is alleged that she is barred of dower, and it is so adjudged, she is concluded by the judgment.

Turley v. Vanarsdale, 13 Ky. Opin. 111.

A personal judgment against a married woman is improper, where not asked for in the petition, and where it is shown that she was a married woman when she joined in the execution of the note upon which judgment was rendered, and the fact that she became discoverd by divorce before the date of the judgment did not authorize it.

Hughes v. Nash, 13 Ky. Opin. 341.

§ 285. Right to allowance for maintenance.

§ 298.—Amount of award.

Where a husband has paid for property by borrowing money, and he and his wife separate, the wife should not be allowed all the property for the support of her family and herself, to the exclusion of a bona fide claim of the creditor who loaned the money to the husband to improve such property.

Lennen v. Fitzpatrick, 13 Ky. Opin. 204.

§ 299½.—Custody of children.

All things being equal, the father is entitled to the children on a separation from his wife, but the court should make an order that the wife should be permitted to see her son at reasonable periods.

Hughes v. Hughes, 10 Ky. Opin. 37.

VIII. SEPARATION AND SEPARATE MAINTENANCE.

§ 277. Separation agreements.

§ 278.—Requisites and validity.

A stipulated payment, in consideration of an agreed separation between husband and wife, is binding on the wife, and precludes her from setting up claim against her deceased husband's estate.

Young v. Watson, 3 Ky. Opin. 210.

The allegation in a petition, setting out an agreement of separation between husband and wife, showing a

stipulated sum paid in consideration, is not demurrable.

Young v. Watson, 3 Ky. Opin. 210.

Unless a deed made by a husband to his wife in accordance with a separation agreement is made a part of the record in divorce proceedings, instituted by him, the decree rendered in the divorce suit will not affect it.

Williams v. Williams, 3 Ky. Opin. 363.

Where, upon separation by husband and wife, he made a deed of trust to his wife, reciting a consideration and "grants to the said J. B. Husbands as trustee aforesaid and in trust for said party, and her heirs by said party of the first part," etc., the wife is the sole beneficiary, but took by the deed a joint estate with her children, the word "heirs" being used for "children."

Flournoy v. Allen, 3 Ky. Opin. 423.

The use of the words "for her use" in a separation agreement between husband and wife, though ordinarily conveying a life estate, upon the contingency happening, will entitle the wife to a conveyance in fee of that which she would have been entitled to if she had instituted a suit at first.

Williams v. Williams, 3 Ky. Opin. 363.

Where, upon a separation, the husband contracted in writing and "set aside for said wife" certain lands, providing that in case she should secure a divorce, he would "convey to the trustee for her use" the said lands, upon the divorce of the wife no further deed was necessary.

Williams v. Williams, 3 Ky. Opin. 363.

The fact that the husband secured a divorce in action in which the wife was constructively summoned, will not alter the terms of the contract between him and his wife in which he set aside certain lands to her in case she should secure a divorce.

Williams v. Williams, 3 Ky. Opin. 363.

Hull v. Evans, 2 Ky. Opin. 538.

§ 285. Actions for separate maintenance.

§ 301.—Costs.

Under R. S., ch. 25, § 32, the husband, in a suit for alimony or divorce, must pay the costs of each party, unless the wife is at fault or has ample estate to pay the cost, incurred by her.

Forstan v. Forstan, 6 Ky. Opin. 150.

HYPOTHETICAL QUESTIONS.

See Criminal Law, § 485.

IDEM SONANS.

See Attachment, § 286.

IDENTITY.

See Names, § 14.

Evidence of, see Evidence, § 601; Homicide, § 154.

IMPEACHMENT.

Contradictory statements of witness, see Witnesses, § 379.

Of compromise agreement, see Compromise and Settlement, § 19.

Of verdict, see Trial, § 344.

Of witness, see Witnesses, §§ 320, 333, 345, 379.

IMPLIED CONTRACTS.

See Contracts, § 27.

IMPROVEMENTS.

§ 1. Nature and effect of making in general.

§ 3. Ownership.

§ 4. Compensation.

See Dower, § 87.

Allowance for, in partition proceedings, see Partition, § 85.

By life tenant, see Life Estates, § 17.

Consideration of in suit for partition, see Partition, § 109.

Erection of buildings by owner of particular estate, see Descent and Distribution, § 73.

Failure of tenant to make improvements agreed to be made, see Landlord and Tenant, § 159.

Liability of vendee for improvements made by vendee, see Vendor and Purchaser, § 201.

Made by co-tenant, see Tenancy in Common, § 29.

Made by husband on wife's land, see Husband and Wife, §§ 141, 150.

Right of tenant to remove improvements on leased premises, see Landlord and Tenant, § 157.

Public improvements, see Municipal Corporations, IX.

Right to credit for, see Descent and Distribution, § 93.

§ 1. Nature and effect of making in general.

Ordinarily a purchaser by a parol contract, turned out of possession by his vendor, is entitled to be paid for his improvements, and if the owner of land induces another to enhance its value by improving it, with a verbal assurance that he will be compensated by having the use of the property for a term of years, he will be allowed the value of his improvements, with a lien on the land, if the owner requires restitution of the possession in violation of his agreement.

Cornellison v. Cornellison's Admr., 3 Ky. Opin. 709.

Where appellee made the improvement after settlement suit was begun and the contract annulled, he has no right to compensation therefor.

Pointer v. Cassady, 3 Ky. Opin. 649.

If improvements are made by a party in possession of lands, under the belief that he is the owner, by reason of a valid legal or equitable claim, the foundation of which was of public record, he is entitled, on eviction, to his improvements, measured by the increase in the vendible value of the land, when recovered, arising from the improvements; but in no event to exceed the consequent enhancement of the value, beyond the rent, waste and deterioration.

Brawner v. Botton, 4 Ky. Opin. 549.

An exhibition of a claimant of a deed, never recorded, and the consideration not appearing to have been paid, does not invest him with title nor impress the belief to that effect, and does not entitle him to claim improvements under the statute.

Brawner v. Botton, 4 Ky. Opin. 549.

Where a tenant for life stands by and permits an owner of an undivided interest in remainder to construct a valuable building on the land, and makes no objection thereto or claim of rent thereon until after the remainderman becomes insolvent, she is estopped to claim such improvement as against his creditors, but she is not estopped to assert her claim for the ground rent.

Watson v. Braun, 12 Ky. Opin. 104.

§ 3. Ownership.

An innocent purchaser in the possession of real estate upon which he has made improvements, is not affected by a judgment affecting the ownership, when not a party to the suit.

Frank v. King, 9 Ky. Opin. 263.

§ 4. Compensation.

One who has erected a building on the land of another by mistake, must, within a reasonable time, remove the building, or abandon the improvements to the owner of the land.

Crain v. Hargis, 6 Ky. Opin. 410.

Where the defendant had improved land, under the belief induced by his mother that she would not reclaim the possession, but would ultimately convey the land to him, but he was afterwards ousted by the administrator of her estate, he will be allowed the value of his improvements with a lien on the land.

Cornellison v. Cornellison's Admr., 3 Ky. Opin. 709.

Where appellee made the improvement after settlement suit was begun and the contract annulled, he has no right to compensation therefor.

Pointer v. Cassady, 3 Ky. Opin. 649.

Where improvements are made on land under a title bond which is void the assessments should be made only

to ameliorate and not for costs of them, and the material used from land should be deducted, and any improvement made after notice to stop should be disallowed.

Montgomery v. Stapp, 4 Ky. Opin. 191.

Appellee having made the improvements in good faith was entitled to be paid for them, just the amount the land was enhanced in value at the time the suit was brought, he being liable for rent beginning at the same time.

Elder v. Procise, 5 Ky. Opin. 44.

Where appellee contributed the money necessary to construct the storehouse in controversy, which was built on the lands of the appellant and with his full knowledge and consent, although there was no contract between them, and appellee occupied the house for some months previous to the institution of the suit, with the acquiescence of appellant; and while the building was being constructed, appellant talked with appellee about it, and spoke of the manner in which the foundation was to have been built, a court of equity, under such circumstances, would not give to the owner of the land this expenditure of the appellee's money without some compensation, and appellee has an equitable right to recover the value of the house, less the rent.

Vanmeter v. Woods, 5 Ky. Opin. 316.

One person can not hold another responsible for improvements made on the land in question where there is no privity shown.

Heaberland v. Griffee, 7 Ky. Opin. 496.

Where one entered upon land and improved it, he can not be compelled to account for rents without granting him an allowance for the improvements made by him.

Mercer's Exr. v. Caldwell, 7 Ky. Opin. 58.

Where improvements were not made under a contract, either express or implied, an allegation as to their value can not be taken as true.

Weisenberger v. Groebe, 7 Ky. Opin. 72.

Where persons have built a house on the land of the ward and made improvements thereon under the mistaken belief that the guardian had authority to contract therefor, the chancellor should permit them to remove the materials placed thereon within a reasonable time, leaving the land in as good condition as when they began to make the improvements; or permit the ward to pay for the improvements to the extent that they have enhanced the value of the land.

Walter & Stuck v. Johnston, 7 Ky. Opin. 482.

Where purchasers of real estate, believing their title secure, have placed valuable improvements thereon, it would be inequitable to permit those claiming title to secure such improvements.

Melton v. Caigill, 8 Ky. Opin. 234.

One in the occupancy of real estate under the belief that he owns it, relying upon a grant to his remote vendor, is entitled under the statutes to pay for improvements he placed upon such land.

Green v. Keltmers, 11 Ky. Opin. 98.

Occupying claimants, under deeds of conveyance, are entitled to have lasting improvements made by them set off against the rents of the land.

Chaney v. Flynn, 11 Ky. Opin. 164.

An occupying claimant of land purchased by a verbal contract while not entitled to compel specific performance, is entitled to have a lien decreed for improvements made on the land by him; and when he is the son-in-law of the owner of the land an advancement to his wife by her father can not be charged against the son-in-law and be deducted from the amount of his claim and lien.

Stephens v. Reavis, 11 Ky. Opin. 394.

Where a commissioner's report is confirmed, and an appeal is taken from the order of confirmation, but no supersedeas is granted, the purchaser at such a sale should be compensated for improvements made on the land, and where the appeal is sustained the value of such improvements should be set off as against the rent of the land

while in the possession of such purchaser.

Hayden v. Smith, 12 Ky. Opin. 249.

Where one having color of title and believing he has title enters upon real estate and makes lasting improvements thereon, in good faith, and it is afterwards determined by the court that he is not the owner but a tenant in common with another who owns a half-interest in the real estate, equity requires that in making partition the value of such improvements shall go to the one who made them.

McGill v. Cromwell's Guardian, 12 Ky. Opin. 260.

Where the occupant of land given him by his father improves it, believing that he owns it, and it is thereafter adjudicated that he does not own it, he is entitled to receive the value of such improvements, less the rents, from the time the occupant's brother repudiated the award, and this will not be determined by the enhanced value of the land upon which they were placed.

Hoffman v. Hoffman, 12 Ky. Opin. 617.

IMPRISONMENT.

See False Imprisonment.

INCOME.

Bequest of, see Wills, § 618.

INDEBTEDNESS.

Deduction from assessed valuation, see Taxation, § 354.

INDEMNITY.

§ 2 Requisites and validity of contracts.

§ 4.—Bonds of indemnity.

§ 5. Construction and operation of contracts.

§ 8.—Subject-matter.

§ 9.—Scope and extent of liability.

§ 15. Actions on contracts.

Indemnity bond, see Sheriffs and Constables, § 89.

Indemnity mortgages, see Mortgages, § 18.

Liability of sheriffs on indemnity bond, see Sheriffs and Constables, § 89.

Liability on indemnity bond, see Execution, § 206.

Promise to answer for debt or default of another, see Frauds, Statute of, § 19.

§ 2. Requisites and validity of contracts.

§ 4.—Bonds of indemnity.

Where one signs an indemnity bond as surety for another who signs an appeal bond, he has a right to expect the appellant to prosecute his appeal in good faith, and if the person holding the indemnity bond, by purchase or otherwise, so far alters the situation as to make it to his interest to have the judgment affirmed, the indemnity bondsmen would thereby be released as to him.

Bridgeford v. Burbank, 8 Ky. Opin. 872.

§ 5. Construction and operation of contracts.

§ 8.—Subject-matter.

Where A, at the request of the administrator, purchased a slave belonging to the estate of the deceased, and delivered him to the agent of the administrator, with the understanding between him and the administrator and the heirs of the deceased, that the collection of the debt would be enjoined, and in any event A should be indemnified out of the estate, A and his sureties are entitled to indemnity for money collected on such debt.

Lansdale v. Brashears' Admr., 7 Ky. Opin. 648.

§ 9.—Scope and extent of liability.

One can not recover on a written obligation delivered to one person to be delivered to another as indemnity to him for signing a note, where there is nothing in the obligation to show that the signer of the note received it as collateral, since the court can not gather the intention of the parties from that which does not appear in the obligation.

Price v. Rodman, 11 Ky. Opin. 7.

§ 15. Actions on contracts.

Where mortgaged property was levied on and sold, the remedy of the mortgagee is on the indemnifying bond executed in compliance with § 709, Civ. Code Prac.

Scott v. Walker, 7 Ky. Opin. 334.

INDICTMENT AND INFORMATION.

I. NECESSITY OF INDICTMENT OR PRESENTMENT.

§ 3. Offenses which must be prosecuted by indictment.

II. FINDING AND FILING OF INDICTMENT OR PRESENTMENT.

§ 11. Return and filing or record.

§ 15. Successive indictments for same offense.

III. FORMAL REQUISITES OF INDICTMENT.

§ 34. Indorsements.

IV. FILING AND FORMAL REQUISITES OF INFORMATION OR COMPLAINT.

§ 46. Formal requisites of information.

§ 51.—Signature.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

§ 58. Subject-matter of allegation.

§ 70. Directness and positiveness.

§ 71. Certainty and particularity.

§ 74. Language and form of allegations.

§ 75.—In general.

§ 81. Designation and description of accused.

§ 82. Codefendants.

§ 87. Time of offense.

§ 92. Act or omission constituting offense.

§ 93.—In general.

§ 97. Separate counts.

§ 98.—In general.

§ 101. Designation of person injured or others.

§ 106. Description of or setting forth written or printed matter.

§ 107. Statutory offenses.

§ 110.—Language of statute.

§ 114. Previous convictions and habitual criminals.

VI JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

§ 125. Duplicity.

- § 126. Joinder of counts.
- § 127.—In general.
- § 130.—Distinct offenses in general.

VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

- § 135. Motion to quash or set aside.
- § 136.—Nature of remedy.
- § 137.—Grounds.
- § 145. Demurrer.
- § 147.—Grounds.

VIII. AMENDMENT.

- § 158. Indictment.
- § 159.—In general.

See Abduction, § 5; Assault and Battery, § 73; Burglary, § 17; Conspiracy, § 43; Counterfeiting, §§ 14, 15, 16; Criminal Law, § 970; Disturbance of Public Assemblage, § 5; Elections, § 313; Embezzlement, § 26; Escape, § 9; False Pretenses, § 25; Forgery, §§ 25, 26; Fraud, § 68; Gaming, § 84; Highways, § 164; Homicide, VI; Intoxicating Liquors, §§ 199, 201, 203, 210, 215; Larceny, II, A; Lewdness, § 4; Lotteries, § 28; Nuisances, § 91; Perjury, § 18; Rape, II, A; Receiving Stolen Goods, § 7; Robbery, § 16.

Allegation of malice, see Homicide, §§ 128, 129.

Carrying concealed weapons, see Weapons, § 17.

Filing away of indictment, see Criminal Law, § 303.

For failure to report taxes collected, see Taxation, § 571.

For keeping tippling house, see Intoxicating Liquors, § 213.

For usurpation of office, see Officers, § 89.

Indictment not competent evidence, see Conspiracy, § 45.

Reading indictment to defendant and to jury, see Homicide, § 259.

I. NECESSITY OF INDICTMENT OR PRESENTMENT.

§ 3. Offenses which must be prosecuted by indictment.

The minor class of wrongs known as misdemeanors can be tried, where jurisdiction has been given to inferior courts, without an indictment.

City of Bowling Green v. Gardner, 9 Ky. Opin. 377.

II. FINDING AND FILING OF INDICTMENT OR PRESENTMENT.

§ 11. Return and filing or record.

An indictment presented to the court in the presence of the grand jury, in accordance with an order to that effect, is a substantial compliance with section 120 of Criminal Code.

Commonwealth v. Cork, 1 Ky. Opin. 39.

§ 15. Successive indictments for same offense.

The dismissal of the first indictment before the formation of a jury and before assignment was not a bar to a second indictment.

Gambrel v. Commonwealth, 10 Ky. Opin. 473.

III. FORMAL REQUISITES OF INDICTMENT.

§ 34. Indorsements.

The names of witnesses are required to be indorsed on an indictment, but where this is not done before the return by the grand jury, it may be done by the commonwealth's attorney after that time.

Commonwealth v. Wainscott, 8 Ky. Opin. 723.

A defendant can not be required to plead to an indictment not indorsed "a true bill" and signed as prescribed by § 118 of the Code.

Commonwealth v. Wainscott, 8 Ky. Opin. 723.

Where an indictment is not indorsed "a true bill" and signed by the foreman of the grand jury, it is not properly presented nor found, and should be quashed or dismissed.

Commonwealth v. McGuire, 9 Ky. Opin. 236.

The failure to indorse on an indictment the names of the witnesses examined before the grand jury is not sufficient ground for dismissing the charge, the statute requiring such indorsement being directory only.

Doty v. Commonwealth, 9 Ky. Opin. 539.

IV. FILING AND FORMAL REQUISITES OF INFORMATION OR COMPLAINT.

§ 46. Formal requisites of information.

§ 51.—Signature.

An indictment should not be dismissed on motion because of the failure of the clerk to sign his name to the endorsement on its back to the effect that it was filed in open court, where the record shows that the indictment was returned into court, was ordered filed, and prior to the dismissal the prosecution was once continued.

Commonwealth v. Stegala, 10 Ky. Opin. 428.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

§ 58. Subject-matter of allegations.

Where more than one offense is charged in an indictment, except as provided for in § 126, Crim. Code, a demurrer is proper.

Smith v. Commonwealth, 5 Ky. Opin. 260.

§ 70. Directness and positiveness.

An indictment must be direct and certain; first, as to the party charged; second, as to the offense charged, and where the offense involves the commission of an attempt to commit an injury to persons or property, and is described in other respect with sufficient certainty to identify the act, an erroneous allegation as to the person injured or attempted to be injured is not material, but where the indictment charges shooting at A and the proof shows shooting at B, the variance is fatal.

Bealman v. Commonwealth, 4 Ky. Opin. 622.

§ 71. Certainty and particularity.

An indictment must allege the offense with such certainty as to enable accused to know what he is called upon to defend, and to constitute a bar to any subsequent prosecution for the same offense.

Commonwealth v. Nichell, 6 Ky. Opin. 61.

The principle has been repeatedly recognized and acted on by this court

that an indictment must set forth the offense with such degree of certainty as will apprise the defendant of the particular accusation on which he is to be tried, and as will enable him to plead the indictment and judgment thereon in bar of any subsequent prosecution for the same offense.

Mount v. Commonwealth, 1 Ky. Opin. 345.

An indictment is sufficient if it specifically apprise the defendant of the particular charge against him.

Commonwealth v. Folie, 1 Ky. Opin. 408.

Where on examination of an indictment it appears that two offenses are attempted to be charged, but it fails to apprise the defendant for which offense he is to be tried, the acts relied on as constituting the offense are not stated in such manner as to enable accused to know for what particular offense he is to be tried.

Commonwealth v. Webster, 4 Ky. Opin. 651.

An indictment should show that it is found by a grand jury of a county or city impaneled in a court having authority to receive it; that the offense charged was committed within the jurisdiction of the court at a time prior to the finding of the indictment; that the act or omission charged as an offense is stated with such a degree of certainty as to enable the court to pronounce judgment on conviction.

Commonwealth v. Bland, 5 Ky. Opin. 795.

§ 74. Language and form of allegations.

§ 75.—In general.

The preamble and body of an indictment must be construed together, and if they show with certainty to a common intent that a felony was committed, it is sufficient.

Commonwealth v. Keith, 4 Ky. Opin. 34.

An indictment must contain a statement of the acts constituting the offense, in ordinary and concise language, stated in such a manner as to enable a person of common understanding to know what is intended; and an indictment charging accused

with cruel and inhuman treatment of his family is fatally defective if there is no allegation that the children were in the custody and control of accused or that they were unable by reason of their tender years to provide food and clothing for themselves.

Berry v. Commonwealth, 4 Ky. Opin. 639.

While only one offense may be charged in an indictment, the mode and means of committing that offense may be stated in the alternative.

Blackerter v. Commonwealth, 8 Ky. Opin. 541.

To charge a person named in an indictment with "being a tavern keeper," is not charging that such person was a licensed tavern keeper.

Commonwealth v. Cooney, 9 Ky. Opin. 1.

When it is sought in an indictment to hold a person liable for a penalty, prescribed alone against such as are licensed, the facts which render him liable, and not the pleader's conclusion from those facts, must be stated.

Commonwealth v. Cooney, 9 Ky. Opin. 1.

It is not necessary to a charge of felony in an indictment for cutting and carrying away trees, when the word feloniously is used in stating the motive of the offender, to allege that the offense was committed without the consent of the person injured by its perpetration; since his consent, if it was given, is a matter of defense.

Commonwealth v. Curley, 11 Ky. Opin. 263.

A verbal inaccuracy, like an error in spelling, which does not affect the meaning, is not fatal to an indictment; and an indictment charging one with the crime of malicious shooting with intent to kill, which leaves out the word "with," will not render the indictment bad.

Scott v. Commonwealth, 13 Ky. Opin. 763.

§ 81. Designation and description of accused.

Where a person or thing necessary to be mentioned in an indictment in a criminal case is described with cir-

cumstances of more particularity than is required, those circumstances must be proven as alleged.

Talbott v. Commonwealth, 9 Ky. Opin. 824.

§ 82. Codefendants.

Where an offense is charged against one in an indictment, and in the caption two persons are named, and it is stated in the body of the indictment that the other person named in the caption joined in committing the act set forth, no sufficient charge is made against the last named person.

Commonwealth v. Briggance, 11 Ky. Opin. 514.

§ 87. Time of offense.

An indictment for a misdemeanor is sufficient if it alleges that the offense was committed in a certain month, without giving the day of the month.

Ewing v. Commonwealth, 4 Ky. Opin. 609.

It is only necessary to state in an indictment, in substance, that the offense charged was committed at a time before the indictment was returned, no greater precision as to the time of the commission being required.

Ravenscraft v. Commonwealth, 13 Ky. Opin. 1135.

§ 92. Act or omission constituting offense.

§ 93.—In general.

An indictment, to be sufficient, must contain an averment of the acts constituting the offense in ordinary and concise language, and where defendant is only charged with permitting games of chance to be played for money, etc., on premises under his control, it is defective, for it states only a conclusion of law.

Beal v. Commonwealth, 9 Ky. Opin. 533.

It is necessary to state in an indictment the acts constituting the offense, and not mere conclusions of the pleader, and to charge an unlawful assembly it was necessary to allege that the parties charged assembled with the intention to aid each other, and to charge the thing intended to be done so that the court might judge whether it was unlawful.

Downes v. Commonwealth, 9 Ky. Opin. 112.

An indictment under § 8, art. 28, chap. 29, Gen. Stat., is sufficient which charges the defendant with unlawfully and wilfully cutting and peeling a lot of fruit trees, ornamental trees and shrubs standing on the land of B, and being his property, the indictment also stating that the trees, etc., cut and peeled were injured and killed by the acts of appellee.

Commonwealth v. Compton, 9 Ky. Opin. 283.

§ 97. Separate counts.

§ 98.—In general.

Criminal Code, § 263, subsec. 2, permits the joinder of causes in different counts where they all embrace injuries to the person; and in such a case the commonwealth can not be required to elect upon which count it will prosecute.

Rose v. Commonwealth, 11 Ky. Opin. 568.

§ 101. Designation of person injured or others.

The attorney for the commonwealth has no authority to remedy a defect in an indictment in the name of the injured person by inserting in the record the real name of the person injured.

Bealman v. Commonwealth, 4 Ky. Opin. 622.

§ 106. Description of or setting forth written or printed matter.

Description of a written instrument in an indictment is not required when the instrument is withheld or destroyed by the act or procurement of the defendant, but it must be alleged in the indictment that said instrument was lost or destroyed.

Mount v. Commonwealth, 1 Ky. Opin. 345.

It was not the intention of the framers of the criminal code to dispense with all particularity of description of written instruments, which may be the subject of indictment for forgery, larceny, or other offenses, as shown by section 135.

Mount v. Commonwealth, 1 Ky. Opin. 345.

§ 107. Statutory offenses.

It is not necessary to allege in an indictment the existence of the law

under which it is made, since that is a question for the court.

Adams v. Commonwealth, 4 Ky. Opin. 608.

§ 110.—Language of statute.

An indictment for assault and battery with intent to kill is sufficient when it is substantially in the language of the statute.

Haywood v. Commonwealth, 8 Ky. Opin. 80.

§ 114. Previous convictions and habitual criminals.

A former conviction must be specifically pleaded, whether presented as a defense to an indictment or inserted in the charge by the prosecutor with a view of increasing the punishment.

Carter v. Commonwealth, 11 Ky. Opin. 92.

When it is sought to increase the punishment of one accused of felony on the ground of his former conviction of felony, the former conviction must be alleged as well as proven; and where no such allegation is made in the indictment, it is error for the court to charge the jury that it might find that there had been a former conviction.

Stewart v. Commonwealth, 11 Ky. Opin. 138.

VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

§ 125. Duplicity.

But one offense can be embraced in a single count of an indictment, and only such offenses as may be joined should be included in a single indictment.

Commonwealth v. Griffon, 9 Ky. Opin. 240.

Only one offense can be embraced in a single prosecution.

Commonwealth v. Rogers, 10 Ky. Opin. 435.

An indictment does not charge two offenses when it charges the accused with having cut and carried away a certain number of trees.

Commonwealth v. Searls, 11 Ky. Opin. 335.

It is a misjoinder of offense to charge a defendant with wounding two distinct persons, although the cutting of both may have been contemporaneous acts; and he can not be legally tried and convicted at one and the same time, unless he waives his right to object thereto.

Campbell v. Commonwealth, 11 Ky. Opin. 524.

§ 126. Joinder of counts.

§ 127.—In general.

Criminal Code 1876, § 127, subsec. 4, expressly provides that the charges of robbery and burglary may be joined in one indictment.

Ravenscraft v. Commonwealth, 13 Ky. Opin. 1135.

§ 130.—Distinct offenses in general.

An indictment charging two separate and distinct offenses is insufficient.

Rutherford v. Commonwealth, 9 Ky. Opin. 163.

VII. MOTION TO QUASH OR DISMISS AND DEMURRER.

§ 135. Motion to quash or set aside.

§ 136.—Nature of remedy.

A motion to quash an indictment is equivalent to a demurrer.

McKinley v. Commonwealth, 10 Ky. Opin. 13.

§ 137.—Grounds.

It is error in the court to set aside an indictment because of the fact that one of the grand jurors by whom it was returned was under the statute incompetent.

Commonwealth v. May, 8 Ky. Opin. 573.

An indictment, to be good against a motion to quash, must contain a statement of the alleged offense with reasonable certainty and distinctness, such as will apprise the accused of the facts intended to be proved against him.

Commonwealth v. Griffon, 9 Ky. Opin. 240.

§ 145. Demurrer.

In a criminal charge, the defect in an indictment should have been taken advantage of by demurrer.

Cox v. Commonwealth, 8 Ky. Opin. 479.

A demurrer to an indictment should not be sustained because of the fact that the title of the case is not stated in the usual form at the head of the indictment.

Commonwealth v. Hayes, 10 Ky. Opin. 329.

§ 147.—Grounds.

Where an indictment improperly joined three offenses, the misjoinder is a good ground for demurrer, but the commonwealth's attorney should in such a case be allowed to elect which charge he would prosecute and which he would dismiss.

Commonwealth v. Goins, 9 Ky. Opin. 108.

VIII. AMENDMENT.

§ 158. Indictment.

§ 159.—In general.

An indictment can only be found and presented by a grand jury, and no amendment can be allowed.

Commonwealth v. Vanmeter, 8 Ky. Opin. 754.

INDORSEMENT.

Accommodations indorsement of bill of exchange, see Bills and Notes, § 237.

Discharge of indorser, see Bills and Notes, §§ 256, 280, 301.

Liability of indorser, see Bills and Notes, V. A.

Liability of accommodation indorser, see Contribution, § 1.

Mode of indorsement, see Bills and Notes, § 248.

Nature of liability of, see Bills and Notes, § 280.

Of indictment, see Indictment and Information, § 34.

On execution, see Execution, § 95.

Presumption of indorsement before maturity, see Bills and Notes, § 247.

Without recourse, see Bills and Notes, § 293.

INFANTS.

I. DISABILITIES IN GENERAL.

§ 7. Eligibility for office or public employment or service.

III. PROPERTY AND CONVEYANCES.

§ 21. Rights of property in general.

- § 25. Contracts for sale of realty.
- § 29. Estoppel.
- § 30. Ratification.
- § 31. Avoidance.
- § 32. Jurisdiction of courts.
- § 35. Sale and conveyances under statutory authority.
- § 36. Sale, mortgage, or lease under order of court.
- § 37.—In general.
- § 39.—Proceedings.
- § 40.—Sale.
- § 41.—Title and rights of purchaser.
- § 45.—Proceeds.

IV. CONTRACTS.

- § 46. Capacity to contract.
- § 47. Validity in general.
- § 50. Necessaries.
- § 55. Estoppel in general.
- § 57. Ratification.
- § 58. Avoidance.

VII. ACTIONS.

- § 72. Rights of action.
- § 73. Jurisdiction and powers of courts.
- § 74. Parties.
- § 76. Guardian ad litem or next friend.
- § 77.—In general.
- § 78.—Necessity for appointment.
- § 81.—Eligibility and qualifications.
- § 85.—Duties and liabilities.
- § 89. Process.
- § 90. Appearance and representation by attorney.
- § 91. Pleading.
- § 93.—Defense of infancy.
- § 104. Judgment.
- § 105.—In general.
- § 110.—Opening or vacating in general.
- § 113.—Operation and effect.
- § 115. Appeal.

See Children; Guardian and Ward; Parent and Child.

Descent of real estate of deceased infant, see Descent and Distribution, § 20.

Judgment against, see Judgment, § 692.
Limitation of action as to infants, see Limitation of Actions, § 72.

Personal judgment against infants without appointment of guardian ad litem, see Judgment, § 16.

Selling intoxicating liquors to minors, see Intoxicating Liquors, §§ 157, 159, 166.

Service of process on infants, see Process, § 56.

Time for taking appeal, see Appeal, § 349.

I. DISABILITIES IN GENERAL.

§ 7. Eligibility for office or public employment or service.

Minors did not lose their right to maintain an action by reason of their failure to sue immediately after arriving at age.

Thompson v. Cooper, 4 Ky. Opin. 336.

III. PROPERTY AND CONVEYANCES.

§ 21. Rights of property in general.

The infant owners of undivided one-ninth of land are entitled to have it allotted to them, as they neither sold nor could sell the same.

Huston v. Dorsey, 1 Ky. Opin. 217.

§ 25. Contracts for sale of realty.

Where an infant sells his land and executes a bond with security that he will make a perfect title when he arrives at twenty-one years of age, the surety in the bond is estopped to assert title to the land against the infant's vendor.

Holland v. Crutchfield, Stone & Co., 5 Ky. Opin. 381.

§ 29. Estoppel.

One having conveyed by deed, although to an infant who does not plead infancy as a ground for rescission, has the right to enforce his lien for the purchase money when the unpaid consideration of the conveyance was stated in the deed.

Doyle v. Barnes, 9 Ky. Opin. 742.

§ 30. Ratification.

Where an infant after becoming of age does such act of affirmance of a deed made during minority as surrendering a bond, when taken in connection with his failure for 32 years to give notice of disaffirmance, it amounts

to a confirmance so as to prevent him from avoiding the contract.

Johnson v. United Society of Shakers, 6 Ky. Opin. 139.

Where an infant joined in a deed with his mother simply in order to strengthen the warranty of title, and received no part of the consideration, his acquiescence therein long after the execution of the deed can not render him responsible.

Moore v. Cleveland's Admr., 6 Ky. Opin. 588.

Where an infant gave a note and executed a mortgage on her real estate during her minority, and after she became twenty-one years of age the mortgage was foreclosed against her, and she made no defense, her conduct amounts to a ratification of her contract, and she can not thereafter question the validity of her contract on the ground of her infancy at the time of its execution.

Hunter v. Bearn, 11 Ky. Opin. 265.

§ 31. Avoidance.

When infants arrive at legal age, they have a right to elect whether to be bound by that which was illegally done during their minority, or repudiate the same.

Thomasson v. Greer, 9 Ky. Opin. 666.

Infants who execute a deed of conveyance before they become 21 years of age, are not estopped from avoiding same after they become of age.

Boston v. Little, 4 Ky. Opin. 391.

§ 32. Jurisdiction of courts.

The Legislature has power to enact laws authorizing the courts of the county, by proper proceeding, to confirm defective sales of infants' real estate, and that, too, in cases where the sale under the original judgment did not divest the infant of title, and the Legislature can confer upon a court of equity the power to execute and consummate a parol contract as against infants, made by the father, if from the proof the court deems it beneficial to the infant.

Pratt v. Cox, 5 Ky. Opin. 410.

§ 35. Sale and conveyance under statutory authority.

A trustee, when empowered to do so, may sell the real estate of minors, without the intervention of the chancellor.

Hawes v. Garrison's Devisees, 8 Ky. Opin. 261.

A proceeding to sell the lands of infants and married women must conform to the provisions of the Revised Statutes, and a judgment rendered in such a case is void when such provisions are not complied with.

Powers v. Tyler, 10 Ky. Opin. 1.

§ 36. Sale, mortgage, or lease under order of court.

§ 37.—In general.

There can be no valid objection to the selling of an infant's real estate in conjunction with other and separate interest in land where it is made to appear that the sale would be to the interest of the infant.

Miller v. Rogers, 6 Ky. Opin. 697.

The purchaser of an infant's land at judicial sale is not bound to complete his purchase unless the requirements are complied with.

Parker v. Hawkins, 4 Ky. Opin. 90.

Where a sale of infant's lands are ordered, their trustee is not bound to individually provide funds with which to better protect their interest, but a selection by him of their father to purchase the estate on time, is a sufficient compliance.

Woods v. Thompson, 4 Ky. Opin. 207.

A petition for the sale of an infant's land, in which there is a contingent remainder interest, must allege that the interests of the claimants of the future estate would be best subserved by the sale of the entire and absolute title to the property.

Parker v. Hawkins, 4 Ky. Opin. 99.

Where an infant's real estate is sold for other lands, in the event the sale shall be adjudged to be void the purchaser of the infant's land is entitled to the property in which the proceeds has been invested.

Headley v. Simmons, 5 Ky. Opin. 65.

A sale of an infant's land can not be impeached in a collateral proceeding.
Edwards v. Carter, 5 Ky. Opin. 59.

Where S joined in an application to have land of infants sold, it impliedly raises an implication on his part to bid for the land the amount which he had promised to pay for it.

Prentiss v. Sanders, 6 Ky. Opin. 296.

Prior to the passage of the act of January 16, 1882, where an action was brought by an infant's guardian against such infant to procure an order to sell its real estate, the infant being less than fourteen years of age, the sale under such order is valid when the infant was actually served with process and a guardian ad litem is appointed to appear for such infant, and where an answer was filed for such infant by its regular guardian who was the plaintiff, and no guardian ad litem was appointed, if the sale was a fair one, the title conveyed should not be disturbed.

Schuk v. Stoll, 13 Ky. Opin. 109.

§ 39.—Proceedings.

Where one by joining in an application for the sale of infant's lands promised to bid them in at their full value, but refused to do so, and only bid about two-thirds the actual value, he will be required to increase his bid to the amount which he originally agreed to pay with interest from the time the deferred payments would have fallen due, or lose his right under his bid.

Prentiss v. Sanders, 6 Ky. Opin. 296.

The interests of infants in real estate can not be sold except by following the steps pointed out in the statute.

Cosby v. Fenlock, 8 Ky. Opin. 135.

§ 40.—Sale.

A sale of land in which infants have an interest should not be ordered without the appointment of a guardian ad litem for such infants.

Davidson v. Davidson's Admr., 10 Ky. Opin. 828.

Where in a suit to sell real estate, one minor defendant was not served by

process, but appeared by a guardian ad litem, and the omission is discovered before sale, the irregularity may be cured by supplementary pleadings and proceedings so as to bind such minor's interest.

Smizer v. Inskeep, 12 Ky. Opin. 668.

§ 41.—Title and rights of purchaser.

In a suit in equity to confirm the sale of infants' lands, it can not avail the plaintiff that no objection was made by the infants to the order declaring the sale, nor to the one affirming it.

Prentiss v. Sanders, 6 Ky. Opin. 296.

Where the sale of an infant's land is shown to be beneficial to the infant, the chancellor will uphold the sale, unless the proceeding under which the sale was made is so defective as to preclude the chancellor from giving a valid title to the purchaser.

Miller v. Rogers, 6 Ky. Opin. 697.

§ 45.—Proceeds.

The purchaser of the real estate of minors, sold by a trustee, is not required to see to it that the purchase money is properly applied.

Hawes v. Garrison's Devisees, 8 Ky. Opin. 261.

IV. CONTRACTS.

§ 46. Capacity to contract.

A purchaser of cattle from the son of plaintiff, who was under age, and known to the defendant to be so, is liable for the highest market value thereof.

McClure v. Hume, 3 Ky. Opin. 612.

A contract made with an infant for the sale of his real estate can not be enforced by proving the declarations of the infant, prior to his arriving of age, to the effect that the consideration had been fully paid, and without showing that the contract was beneficial or that the wants of the infant required the sale to be made.

Duncan v. Dorsey, 8 Ky. Opin. 379.

Infants are incapable of perpetrating a fraud or of binding themselves by contract or by estoppel.

Johnson v. Stewart, 10 Ky. Opin. 270.

The period at which a person shall be deemed of age in order to bind himself or herself by contract is arbitrary, and may be changed by the Legislature at any time.

Blancoe v. Elliott, 10 Ky. Opin. 492.

§ 47. Validity in general.

An assignment by a step-mother to her step-son of her contingent right of dower and distribution in his father's estate, in exchange for land owned by the step-son is without consideration, and the son being a minor has the power to rescind the exchange.

McCain v. Crabtree, 3 Ky. Opin. 565.

§ 50. Necessaries.

In order to enforce the contract of an infant it must be shown that the property purchased was necessary for his support, and where the whole fortune of the infant is less than \$1,000.00, the annual profits of which would not be sufficient to maintain him in the most economical style, a horse is not a necessity.

Williams v. Portwood, 5 Ky. Opin. 737.

Although an infant may not be liable on a written acknowledgment and promise to pay for necessities furnished him, yet his real or implied promise may be enforced in an action against him.

Davidge v. Hopson, 1 Ky. Opin. 536.

The purchase of a horse by a minor to operate a farm upon which he was living as the head of a family, and from the use of which a support for himself and family was obtained; and the jury believed that the purchase by the minor of the horse was necessary for the minor's use, though while he could not bind himself by the execution of a note therefor, the law will bind him to pay the reasonable value of the horse, and what he promised to pay for the horse will be competent evidence conducing to show its value.

Young v. Gudgell, 2 Ky. Opin. 264.

§ 55. Estoppel in general.

Where an infant, who is a party to a contract of settlement, fails to set up such infancy, he is bound by the

terms of such settlement the same as if not an infant.

Pilant v. Wilson, 8 Ky. Opin. 256.

§ 57. Ratification.

A new promise by an infant, to pay a note, in the absence of false statements relative to the note, or the age of the promisor, does not constitute an estoppel by anything said or done, from making a defense on the ground of infancy.

Davis v. Boyd, 4 Ky. Opin. 346.

A promise, by one, after becoming of age, not in writing, to pay a note, is not enforceable under the Statute of Frauds.

Davis v. Boyd, 4 Ky. Opin. 346.

§ 58. Avoidance.

Neither an infant nor any one else can repudiate his sale of land without restitution.

Saffell v. Butts, 1 Ky. Opin. 250.

The sale of an infant's land was held voidable by his heirs.

Saffell v. Butts, 1 Ky. Opin. 250.

Where, on May 16th, 1865, P made a voluntary deed of gift to her infant daughter, F, of various articles of household furniture, and the deed was duly recorded; and afterwards, the mother and daughter executed their joint note with a mortgage on the furniture to secure its payment; as the record discloses no evidence of actual fraud in the execution of the deed of gift, and as it was made before the debt of appellee existed, it operated to vest title to the property in the infant, and she had a right to avoid the note and mortgage on the grounds of her infancy.

McKenzie v. Stratton, 2 Ky. Opin. 315.

VII. ACTIONS.

§ 72. Rights of action.

Under the provisions of subsec. 8, § 579, Civ. Code, an infant defendant has the same right before, as after attaining his majority, to prosecute an action to vacate or modify any erroneous judgment that may have been rendered against him.

Wandling v. Kennedy, 4 Ky. Opin. 305.

A purely technical defense will not be allowed to prevent infants from being deprived of their rights.

Morrow v. Clouch, 8 Ky. Opin. 73.

§ 73. Jurisdiction and powers of courts.

An order confirming a master commissioner's report, appearing to have been made at the time of the filing of the same, without allowing a guardian to file exceptions to it, is erroneous.

Ducker v. Bonar, 1 Ky. Opin. 58.

Whether infants are represented by statutory guardians or not, where an action is brought for them to protect their estate the court has jurisdiction to hear and determine the same.

Morrow v. Clouch, 8 Ky. Opin. 73.

§ 74. Parties.

An infant can not be made a party plaintiff to an action for the purpose only of defeating his rights.

Foster v. Ewing, 7 Ky. Opin. 503.

In view of the provision of section 40, Civil Code, that "Where a determination of the controversy between the parties, before the court, can not be made without the presence of other parties, the chancellor must order them brought in;" it is the duty of the court, in exercising general supervision over the rights of infants, to have them brought in as parties to an action.

Bradley v. Collins, 1 Ky. Opin. 509.

Now, infants must be made defendants to a proceeding to sell their lands, but prior to the adoption of the Code of Practice the guardian, by an ex parte petition in which his wards joined him, could legally procure an order for the sale of his ward's land.

Devlin v. Bethshears, 13 Ky. Opin. 862.

§ 76. Guardian ad litem or next friend.

§ 77.—In general.

The mere appointment of a guardian ad litem for infants, to take care of their interests, is not sufficient; but before a judgment can be rendered affecting the infants' interest, it must appear that the appointment has been accepted, and a necessary answer tendered for them.

Dix v. Clapham, 3 Ky. Opin. 283.

Under section 55, Civil Code, providing that "No judgment can be rendered against an infant until defense by guardian," if no guardian ad litem was appointed to defend for infants, and no defense was made for them, a decree against the infants is void.

Ducker v. Bonar, 1 Ky. Opin. 58.

It is reversible error not to appoint a guardian ad litem for an infant.

Robinson's Admr. v. Hicks, 1 Ky. Opin. 152.

A next friend can not defend for minor children, as none but a guardian can do this.

Lowden v. Boulmore, 1 Ky. Opin. 444.

The appearance of a minor defendant can not be entered by attorney, as the minor must be summoned, and then it is the duty of the court, as the friend of infants, to see that a guardian is appointed, who must have an opportunity to defend.

Lane v. Roberson, 1 Ky. Opin. 520.

No one but an infant can take advantage of the error in not appointing a guardian ad litem.

Robinson's Admr. v. Hicks, 1 Ky. Opin. 152.

It is reversible error to render a judgment against a minor without having a guardian appointed to defend him.

Young v. Gudgell, 2 Ky. Opin. 264.

In an action against infants, the father can not answer for them, and it is erroneous to render judgment against them before a guardian ad litem is appointed.

Carter v. Willitt, 3 Ky. Opin. 400.

Under a sale of infants' lands, as legatees, to coerce a debt due by their ancestor, after they have come into court by a guardian and making defense to the action, they can not complain of the lack of appointment by the court of a guardian ad litem.

Woods v. Thompson, 4 Ky. Opin. 207.

The appointment of a guardian ad litem on the day a warning order is issued an infant, under Civ. Code, § 56, is erroneous, since the appointment

can only be made, after service of process, actual or constructive.

Wandling v. Kennedy, 4 Ky. Opin. 305.

A division of infants' lands, on a petition of the husband of one, and father of the other, as next friend, will be set aside, where a guardian ad litem is not served with notice of his appointment.

McHatton v. Ford, 4 Ky. Opin. 112.

The failure of a guardian ad litem to file an answer for an infant in a proceeding to sell his lands does not render the judgment void, although it is a cause for reversing it.

Dollins v. Perry, 5 Ky. Opin. 763.

In the absence of service of process a guardian ad litem has no power to enter appearance for the persons he represents, and the court thereby secures no jurisdiction to pronounce judgment.

Hoolbrook v. Duck, 8 Ky. Opin. 40.

An infant plaintiff may prosecute his cause by next friend, and when he becomes of age before the judgment is entered, the defendant having filed his answer and gone to trial without excepting, it is then too late to object that the action was prosecuted by next friend after he arrived at age.

Bramel v. Cunningham, 11 Ky. Opin. 409.

§ 78.—Necessity for appointment.

Where the record fails to show that a guardian ad litem was appointed, one filing an answer purporting to be such guardian is a mere volunteer and such answer is ineffectual.

Cook v. Mitchell, 10 Ky. Opin. 494.

Infant defendants who are not served with process and who do not appear by statutory guardian, no guardian ad litem having been appointed, are not before the court and their rights can not be adjudicated; and when such infants are necessary parties the court should not render judgment construing a will until such infants are served with process and appear by guardian.

Ditto v. Porter, 12 Ky. Opin. 500.

Where no one will consent to act as next friend to infants in a suit,

the court may appoint some one to appear in that capacity, and the law does not require that an action shall be dismissed because no next friend assumes to act for minor plaintiffs.

Richardson v. Hunt, 12 Ky. Opin. 618.

§ 81.—Eligibility and qualifications.

An infant may sue by his next friend but a stranger can not sue for an infant merely by describing himself as next friend of the infant.

Long, Admr., v. Duvall, 7 Ky. Opin. 453.

§ 85.—Duties and liabilities.

While the code may require the next friend to make the affidavit preliminary to the institution of an action by an infant, after a defendant has filed his answer, it is then too late to move to dismiss the action for want of the affidavit, since the filing of the answer is a waiver of his right to make such motion.

Staton v. Bryant, 12 Ky. Opin. 336.

§ 89. Process.

Service of process on infants, all of whom are under fourteen years of age, without service on their parents, guardian, or white person having the care or control of them, or with whom they lived, is not a compliance with § 81, Civ. Code, and will not support a judgment.

Haley v. Chambers, 7 Ky. Opin. 573.

Where an order binding out minors or poor children unable to care for themselves does not show a summons for the parent or next friend, or person with whom they resided, to appear and show cause why said order is not made of full force and effect, it will be vacated and annulled.

Taylor v. Taylor, 1 Ky. Opin. 437.

Sureties on a bond, executed for the payment of property sold under judgment against infants can not be heard to complain of its regularity as to the service upon the minors, or their answer by guardian ad litem.

Whitmer & Bidwell v. Nall's Exr., 2 Ky. Opin. 361.

Though service of process upon infant heirs is irregular, a judgment in

favor of creditors will deprive them of no right which they may have as against themselves.

Miller's Admr. v. Miller's Creditors, 3 Ky. Opin. 538.

Civil Code, §§ 81, 579, prescribe the manner of service of process on infants less than fourteen years old, and where not brought into court in the legal way a motion to modify or set aside judgment as to them should be sustained.

Vanarsdale v. Dry, 8 Ky. Opin. 54.

Where infants own real estate, a proceeding to sell it and a judgment of sale are ineffectual where no process was served on such owners.

Applegate v. Cook, 9 Ky. Opin. 31.

When process issued against the minor children of a named person, and there is a return showing service upon infants named as the children of such person, and a guardian ad litem is appointed and answers for such minors, a judgment ordering the sale of their real estate may be legally entered.

Cochran v. Triplett's Exrs., 9 Ky. Opin. 280.

The court does not secure jurisdiction over infants by the service of a summons on a guardian ad litem appointed for them, since such a guardian can only be appointed after the service of process is had on them.

Louisville Industrial Exposition v. Johnson, 10 Ky. Opin. 333.

Where infants less than fourteen years of age are parties defendant service of a summons on their father is sufficient.

Louisville Industrial Exposition v. Johnson, 10 Ky. Opin. 333.

When a summons is delivered to infants and a copy left with their mother, with whom they reside, such process is properly served.

Cook v. Mitchell, 10 Ky. Opin. 494.

Where a suit is brought against a widow and minor children by creditors of her husband's estate to settle such estate, service of process on the mother and upon a trust company, which is administrator of such estate, is not service on such children, but

process served on the guardian of children not over fourteen years of age is sufficient.

Lucas v. Fidelity Trust & Safety Vault Co., 13 Ky. Opin. 935.

§ 90. Appearance and representation by attorney.

The answer of a guardian ad litem for an infant defendant is not an appearance of said infant, when no process was served on such infant.

Applegate v. Cook, 9 Ky. Opin. 31.

§ 91. Pleading.

Where infants are the real plaintiffs in an action, and are old enough to understand the provisions of the Code, relative to the verification of pleading, they should be required to verify the petition.

Goins v. Herndon, 5 Ky. Opin. 70.

Where an infant sells property, for which he had given his note, and in an action to enforce the note, he pleads infancy, and the pleadings fail to show that the property or its proceeds were in the possession of the obligor, after he attained lawful age, he was not bound to make restoration before relying on the plea of infancy.

Davis v. Boyd, 4 Ky. Opin. 346.

§ 93.—Defense of Infancy.

A plea of infancy will not be heard by a chancellor, where the infant claimant stood by and permitted the purchase of his land by another and the payment of the purchase-money without asserting claim to the land, and failed to repudiate the sale for a period of ten years after his arrival at age, and there is doubt as to the validity of his claim.

Donovan v. Johnson, 7 Ky. Opin. 32.

§ 104. Judgment.

§ 105.—In general.

As against an infant defendant, a presumption can not be indulged nor a judgment taken as confessed.

Hill v. Farmer, 6 Ky. Opin. 475.

A judgment can not properly be rendered against an infant until after a defense has been made by a guardian.

Emmons v. Ringo, 6 Ky. Opin. 631.

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Emmons v. Ringo, 6 Ky. Opin. 631.

fact by the defendant, it must be shown that such fraud or mistake was discovered subsequent to the rendition of the judgment, and when a party fails to make a defense in a suit at law, in the absence of fraud on the part of the plaintiff in obtaining the judgment, it will not be set aside.

Whitson v. Bright, 5 Ky. Opin. 341.

§ 28. Special proceedings other than actions.

Where a judgment is rendered in the quarterly court, execution thereon can only be enjoined in that court; and the circuit court has no jurisdiction to enjoin an execution on a judgment rendered by the quarterly court.

Sharp v. Clark, 9 Ky. Opin. 372.

II. SUBJECTS OF PROTECTION AND RELIEF.

(A) ACTIONS AND OTHER LEGAL PROCEEDINGS.

§ 25. Proceedings which may be restrained in general.

An injunction is not maintainable to withhold enforcement of a judgment obtained by default, after process was duly served, and the suit was ignored by defendant.

Febrenbacke v. Straus, 2 Ky. Opin. 506.

Although appellant had a strict legal right to an injunction to prevent the collection of executions, in so far as he had paid them subsequent to the judgment, yet he had no right to stay the collection to that part of the judgment which remained unsatisfied.

Matheny v. Davis, 1 Ky. Opin. 244.

§ 27. Particular proceedings or remedies in civil actions.

Where at the time an injunction was issued to stay proceedings on a judgment, the execution was in the hands of the sheriff, and he levied on personal property, the injunction does not operate to discharge the levy, but the levy remained in force at the time of dissolution of the injunction.

Glenn v. Clayton's Admx., 6 Ky. Opin. 679.

An injunction will not lie to restrain collection of a judgment, in which there is an error, the proper proceeding being by appeal and supersedeas.

Webb v. Stephens, 4 Ky. Opin. 601.

(B) PROPERTY, CONVEYANCES, AND INCUMBRANCES.

§ 34. Property and rights protected in general.

One in possession of real estate which has been sold at the instance of his creditors and bought by the creditor, the sale approved and deed confirmed by the court, and who is a defendant on a writ of possession, has no interest in such land and is not entitled to an injunction against the purchaser and his grantee on the alleged ground that the sale and conveyance of the land by such purchaser was void because the grantee, being a national bank, was not authorized to buy real estate, etc., since one not having an interest can not raise the question of the validity of such transfer.

Miller v. The National Bank of Lancaster, 11 Ky. Opin. 662.

§ 45. Trespass or other injury to real property.

§ 46.—Trespasses in general.

Injunction is an appropriate remedy to prevent trespasses and the carrying away of timber, and to settle a controversy and avoid a multiplicity of suits.

McDowell v. Wiseman, 11 Ky. Opin. 285.

A party in possession of land may maintain an action perpetually enjoining and restraining another from further trespass who has already unlawfully entered thereon and cut timber or otherwise injured the land or disturbed his possession and who will continue to do so unless restrained.

O'Hara v. Johns, 13 Ky. Opin. 653.

§ 52.—Cutting or removal of timber.

A party held entitled to injunctive relief to prevent another from cutting and carrying away timber on land purchased by plaintiff and to which

he has acquired the legal title, as against an equitable owner of the land.

Bodkin v. Merhew, 7 Ky. Opin. 547.

One who bids in real estate at a judicial sale has no right to cut and remove timber on the land before such sale is confirmed, and may be enjoined from doing so.

Gill v. Tanner, 9 Ky. Opin. 361.

(E) PUBLIC OFFICERS AND BOARDS AND MUNICIPALITIES.

§ 74. Officers and official acts which may be restrained in general.

The court has authority, upon final hearing, to grant a perpetual injunction to restrain collection of tax assessments, though no temporary injunction had been sued out in the meantime.

Landram v. Cambers, 3 Ky. Opin. 548.

§ 77. Municipalities and municipal officers in general.

Where the direction of the common council to the marshal is usurpation of power, and if carried out, would amount to a trespass, a court of equity may enjoin the attempted exercise of such power.

City of Henderson v. Burbank, 7 Ky. Opin. 197.

Injunction can not be maintained against a municipality to stay proceedings under a charter or other law, for the purpose of giving time to get it repealed or abrogated; nor to prohibit the local government of a town from proceeding to collect taxes, according to its charter, on the apprehended reason that the money when collected will be misappropriated or incorrectly used.

Miles v. Trustees of Elizabethtown, 3 Ky. Opin. 332.

III. ACTIONS FOR INJUNCTIONS.

§ 110. Jurisdiction.

Where a deed to land in this state has been adjudged a mortgage by a court of another state, that court, having jurisdiction of the person, may

restrain the grantee in the deed from selling the land.

Quinn v. Coleman, 2 Ky. Opin. 82.

In a suit to enjoin the collection of a judgment in a quarterly court on a purchase-money note, on account of the failure of title, it is proper to obtain an order for the injunction in a quarterly court, as no other court has jurisdiction, and the case should then be transferred to the circuit court, as the title to the land is involved.

Kelly v. Kelly, 1 Ky. Opin. 253.

§ 116. Pleading.

§ 118.—Bill, complaint, or petition.

Although a petition be regarded as premature, yet if it shows a present equity, it will be sustained.

Kelly v. Kelly, 1 Ky. Opin. 253.

Properly filing in the circuit court a petition for injunction and rescission, gives to the court jurisdiction over a cross-petition for a specific execution and enforcement of the lien sought to be enjoined.

Birch v. Miller's Admr., 2 Ky. Opin. 498.

A petition for an injunction against the enforcement of a judgment obtained by default, which shows that plaintiff was negligent in answering a former suit and allowed judgment to go against him, is insufficient as a defense, either at law or equity.

Febrenbacke v. Straus, 2 Ky. Opin. 506.

IV. PRELIMINARY AND INTER-LOCUTORY INJUNCTIONS.

(A) GROUNDS AND PROCEEDINGS TO PROCURE.

§ 143. Notice of application.

When a petition for an injunction is sworn to, and the court is satisfied by the affidavit of the applicant, or by other evidence, that irreparable injury will result if the injunction be not immediately granted, he may grant it without a notice first served on the defendant.

Baker v. Hampton, 10 Ky. Opin. 575.

§ 148. Bond or undertaking.

A requirement in an injunction bond that the obligors would pay and satisfy any modified judgment that might be rendered is mere surplusage, since the judgments were not enjoined; and the only obligation on the bond was to pay all costs and damages that might be awarded in case the injunction should be dissolved.

Boone v. Hardwick's Admr., 8 Ky. Opin. 456.

§ 153. Conditions on granting.

Where a sheriff is made a party defendant in an action for temporary injunction and for new trial on the ground that plaintiff has not been served with summons and that the sheriff has made a false return on defendant, it is within the power of the court to compel the sheriff to correct the error.

Ferguson v. Hume, 3 Ky. Opin. 289.

§ 159½. Costs.

No attorney's fee can be allowed for services for defending a temporary injunction, granted in such case, as the jurisdiction of the court, for final adjudication, did not depend thereon.

Landram v. Cambers, 3 Ky. Opin. 548.

(B) CONTINUING, MODIFYING, VACATING, OR DISSOLVING.**§ 163. Grounds for continuing, modifying, vacating, or dissolving.**

One may be enjoined from entering with his employes on the dower land of another for the purpose of taking coal from beneath the surface, and an injunction thus granted should not be dissolved without proof of the issue raised and of the right to take such coal.

Lindley v. Whitaker, 12 Ky. Opin. 149.

§ 168. Motion to dissolve or vacate.

The dissolution of an injunction being only interlocutory, the remedy is an application to a judge of the Court of Appeals for reinstatement and not by appeal.

Carpenter v. Fountain's Exrx., 4 Ky. Opin. 167.

When, on the dissolution of an injunction by the lower court, the petition is dismissed, a judge of the appellate court has no power to reinstate the injunction.

Thomas v. Sizemore, 4 Ky. Opin. 367.

Where, in an effort to enjoin a railroad company from building its line of road in front of plaintiff's business house on the ground of irreparable injury to the business in which he is engaged, by reason of the proximity of the track, no question is raised as to ownership of the street, and the council has granted a right to the company to lay its tracks in the street, the injunction will be dissolved where the allegations in the petition for injunction are denied and no proof is made to sustain them.

Bondurant v. N. C. & St. L. R. Co., 13 Ky. Opin. 469.

§ 183. Reinstatement.

The dissolution of an injunction, on a petition for a new trial, can not be revived by the appellate court until the appellant shall have obtained an order from the court below to stay the dissolution for such time as will enable him to obtain an order from the appellate court to reinstate same; but the dissolution must stand until the petition for a rehearing after the adjournment of the term of court at which the judgment was rendered is finally disposed of, and until this is done the appellate court has no jurisdiction of the case.

Overby v. Penymen, 1 Ky. Opin. 623.

§ 184. Effect of dissolution or discharge.

On the dissolution of an injunction, personal property can be surrendered by the plaintiff to the defendant; and the detention could not be treated as a conversion of them by the plaintiff, he being liable on his bond in consequence of the injunction, to the defendant for any damages sustained by him.

Meade v. Lansdowne, 2 Ky. Opin. 279.

§ 185. Damages on dissolution.

Where an injunction is dissolved, the court may in its discretion call

a jury to assess the damages sustained by those against whom the injunction was procured.

Wyatt v. Tinsley, 8 Ky. Opin. 59.

It is only necessary to assess damages on dissolution of an injunction in those cases where such injunction was to stay proceedings on a judgment.

Love v. Harrison, 10 Ky. Opin. 572.

V. PERMANENT INJUNCTION AND OTHER RELIEF.

§ 191. Perpetuation of temporary injunction.

It was held that neither the pleading nor the evidence on which a case was submitted authorized a perpetuation of the injunction against a judgment.

Woodland v. Foulds, 7 Ky. Opin. 174.

Where a cause is submitted to the court on motion to dissolve an injunction, it is error for the court to make final disposition of the order of injunction by perpetuating it, or to determine the issues involved in the action, such issues not being submitted on such motion.

Martin v. Martin, 8 Ky. Opin. 308.

§ 194. Alternative, additional, or incidental equitable relief.

Where appellee was entitled to gather his corn, but where in the meantime it had been gathered by appellant, appellee is entitled either to the corn or its proceeds.

Caldwell v. Baker, 5 Ky. Opin. 784.

VII. VIOLATION AND PUNISHMENT.

§ 232. Punishment.

Where after an injunction is served the defendant proceeds to do the things he is directed not to do, in addition to being punished for contempt the court has the power without another action to place the parties in the situation they occupied at the time the injunction was granted.

O'Hara v. Johns, 13 Ky. Opin. 653.

§ 242. Actions.

§ 252.—Damages.

Only such damages caused by the delay in selling the land may be recovered on a bond given for an injunction against such sale and the recovery can then only be had unless assessed at the time the injunction was dissolved as required by the statute.

Boone v. Hardwick's Admr., 8 Ky. Opin. 456.

The plaintiff in a suit on an injunction bond can recover only such damages as result to him from the order of injunction granted by the court, and the subsequent litigation in the injunction suit, and he may recover for his attorney's fees.

Walker v. Walker, 9 Ky. Opin. 721.

Upon an injunction being dissolved because wrongfully granted, it is the duty of the court, in a proper case, to assess the damages under such bond, and the assessment of such damages is conclusive against all the obligors in the bond including the surety.

Spray v. Wright, 13 Ky. Opin. 66.

VIII. LIABILITIES ON BONDS OR UNDERTAKINGS.

§ 234. Accrual or release of liability by breach or fulfillment of conditions.

The removal from the state of some of the obligors in the bond, would not relieve the others therein from liability for the amount of all taxes enjoined, and any loss sustained by such removal, will be adjudged against the remaining bondsmen.

Landram v. Cambers, 3 Ky. Opin. 548.

Where the evidence shows that but for an injunction to prohibit a suit on a note, it could have been collected through the process of the court, the injunction bond will become liable for the amount of the debt.

Bell v. Martin, 4 Ky. Opin. 358.

§ 239. Extent of liability.

The liability on an injunction bond in a proceeding to stay the collection

of a judgment, extends only to the damages sustained up to the time of the dissolution of the injunction, but this liability does not extend to the full amount of the judgment enjoined, unless the defendant was thereby prevented from collecting his judgment, and resulted in total loss.

Glenn v. Clayton's Admx., 6 Ky. Opin. 679.

The sureties on an injunction bond are under no obligation to pay the balance due from one estate to the other upon a settlement of claims not involved in the issue made in the action in which the injunction was granted.

Philpot v. Fields, 7 Ky. Opin. 204.

§ 242. Actions.

Where the petition in an action on an injunction bond alleges the execution of a bond, the dissolution and the dismissal of the action, and also recites the amount of the judgment enjoined and the failure of defendants to pay it, it is not subject to demurrer.

Cleveland & Scott v. Phillips & Ison, 5 Ky. Opin. 785.

§ 243.—Rights to action.

Under § 308, Civ. Code Prac., as amended by Act of Feb. 15, 1866, the right of a party to proceed upon an injunction bond given under such amended section depends upon whether he has been damaged by the injunction.

Glenn v. Clayton's Admx., 7 Ky. Opin. 679.

§ 250.—Pleading.

In an action for damages for delay in the delivery of property caused by an injunction, the petition therefor should allege that the damages have been assessed in the manner prescribed, and also the amount of the cost incurred by the party against whom the injunction was obtained.

House v. Moores, 7 Ky. Opin. 530.

§ 252.—Damages.

Where it appears from the records that the defendant is not in fact restrained from proceeding against plaintiff on an order for an injunction, damages will not be awarded.

Smith v. Smith, 1 Ky. Opin. 399.

In an action on an injunction bond, plaintiffs can recover only to the extent that they show they have been injured, and in order to recover plaintiffs must allege facts under which such proof may be admitted.

Moore v. Wilson, 7 Ky. Opin. 551.

IX. WRONGFUL INJUNCTION.

§ 257. Nature and grounds of liability.

The law can not presume that the injunction was not prejudicial to the former bondsman, and against his will.

Fish v. Glass, 3 Ky. Opin. 177.

§ 261. Actions for damages.

Although the action of trespass might have been maintained by the appellee for the destruction of his corn by the appellant, still this does not preclude him from his action against the appellant for the damages sustained by reason of the injunction.

Caldwell v. Baker, 5 Ky. Opin. 784.

Where the owner of a judgment is enjoined from selling property on execution under it, the injunction being wrongfully procured by the defendant, and which is dissolved, the defendant can not escape liability for damages on the injunction by showing that the order of injunction was illegal and void.

Proctor v. Dickey, 9 Ky. Opin. 566.

INNKEEPERS.

Right of tavern keeper to sell intoxicating liquors, see Intoxicating Liquors, § 49.

INNOCENT PURCHASERS.

Protection of, see Vendor and Purchaser, § 213.

INNUENDO.

See Libel and Slander, § 86.

INSANE PERSONS.

I. DISABILITIES IN GENERAL.

§ 2. Evidence of incompetency.

III. GUARDIANSHIP.

- § 30. Nature and grounds.
- § 40. Authority of guardian or committee in general.
- § 42. Accounting by guardian or committee.
- § 45. Liability on guardianship bonds.

IV. CUSTODY AND SUPPORT.

- § 54. Powers and duties of guardian or committee of person.
- § 58. Proceedings to enforce liability for support.

V. PROPERTY AND CONVEYANCES.

- § 60. Capacity to convey.
- § 71. Sale, mortgage, or lease under order of court.

VI. CONTRACTS.

- § 73. Validity in general.

IX. ACTIONS.

- § 87. Capacity to sue and be sued in general.
- § 92. Parties.
- § 98. Evidence.
- § 100. Judgment.

See Drunkards.

Appointment of committee, see Drunkards, § 4.

Deed of insane person, see Deeds, § 68.

Defense of insanity, see Criminal Law, § 48; Homicide, § 294.

Definition of insanity, see Criminal Law, § 48.

Evidence of insanity, see Criminal Law, § 773.

Instruction as to insanity of accused, see Criminal Law, § 773.

Mental capacity to convey land, see Deeds, §§ 12, 68.

Testamentary capacity, see Wills, §§ 33, 34, 38, 39, 40.

I. DISABILITIES IN GENERAL.

§ 2. Evidence of incompetency.

Sanity is presumed by law, and evidence thereof must not only be sufficient to counter-balance the evidence of sanity, but also to overcome this legal presumption.

Grover v. Wigginton, 3 Ky. Opin. 271.

III. GUARDIANSHIP.

§ 30. Nature and grounds.

An instruction in a suit to enjoin one mentally deficient from wasting

his property, that if the person could not prudently manage his estate, then the jury must find against him, is not correct, for it is a fact that many persons of unimpaired intellects do not manage their estates profitably.

Stevenson v. Stevenson, 13 Ky. Opin. 1012.

§ 40. Authority of guardian or committee in general.

Where A was appointed by the court committee of H, a lunatic, and purchased of B lands, using money derived from a sale of lands of the lunatic, made two years before he was so adjudged; and the land purchased of B was in the name of A and deed was made accordingly; though A, as committee of the lunatic, was bound to receive the estate and manage the same advantageously, applying the income, if sufficient for the purpose, to the support and maintenance of the lunatic, it was not his duty to invest it in real estate, and if used in paying for land purchased for his own use and in his own name, a trust would not, by the use of the money in that way, result to the lunatic.

Hornback's Admr. v. Hornback's Admr., 1 Ky. Opin. 596.

The guardian of a lunatic appointed in another state has no power to lease the land of the lunatic situated in this state, and where he does so such lease is void.

Graves v. Lightfoot, 9 Ky. Opin. 868.

While some of the acts of a committee in the sale of a stock of goods were not authorized by law, but such a sale was honest and greatly to the advantage of the estate, and no injury was sustained by such sale, no objections made by the committee's successor, and no suit brought for conversion or for the recovery of the goods, such sale is ratified.

Campbell's Committee v. Bullock, 10 Ky. Opin. 783.

§ 42. Accounting by guardian or committee.

Where a person is serving as committee of a lunatic, and while so serving petitions the court for and receives authority to sell property of

such lunatic in connection with two other persons, the three being styled commissioners, and the sale is made and the money collected by the committee from the buyers of the property or from the other members of the commission, the committee is liable to account for such money.

Burbridge v. Varnon's Exr., 8 Ky. Opin. 87.

Where the estate of a lunatic is committed by a court of competent jurisdiction to a committee, the committee is answerable to the court appointing him for the discharge of his duties, and can only be relieved of those duties by that court, which alone has authority to settle his accounts.

Brand v. Brand, 10 Ky. Opin. 396.

§ 45. Liability on guardianship bonds.

One appointed a committee for handling the estate of a lunatic can not escape liability for such property as may come into his hands as such committee, on the ground that the adjudged lunatic was sane and capable of managing his own affairs.

Hornback's Admr. v. Hornback's Admr., 1 Ky. Opin. 596.

A person becoming surety for a committee of a lunatic, where such committee, in connection with two other persons styled commissioners, to sell personal property of such lunatic, sells such property and collects the money therefor, is liable on his bond whether the committee collects the money or fails to do so, when it was his duty to collect and preserve such funds.

Burbridge v. Varnon's Exr., 8 Ky. Opin. 87.

IV. CUSTODY AND SUPPORT.

§ 54. Powers and duties of guardian or committee of person.

A committee for a lunatic has no power, without permission of the court, to expend for his ward a greater sum than the profits of his estate.

Wood v. Higdon, 10 Ky. Opin. 92.

§ 58. Proceedings to enforce liability for support.

One who contributes to the support of an idiot without any contract or arrangement with the committee

therefor can not recover for the aid furnished, especially where the person so furnishing the aid was fully compensated by use of the ward's property.

Lindsay v. Hedger, 7 Ky. Opin. 617.

V. PROPERTY AND CONVEYANCES.

§ 60. Capacity to convey.

The deed of a lunatic is not void absolutely, but is susceptible of confirmation by the lunatic when restored to sanity.

Sanderson v. Hays, 8 Ky. Opin. 353.

§ 71. Sale, mortgage, or lease under order of court.

The sale of a lunatic's estate pursuant to the provisions of the Revised Statutes, in a proceeding in court to which he is not a party, and no committee is before the court representing the lunatic, is void, since the court in such a case has no jurisdiction of the lunatic's person.

George v. Bradley, 12 Ky. Opin. 632.

Where a trustee of a lunatic seeks to set aside a sale, if a creditor has any lien on the property or fund arising from the sale, he may by petition be made a party to the suit and thus have his rights adjudicated.

Trunk's Committee v. Eastern Kentucky Lunatic Asylum, 13 Ky. Opin. 166.

VI. CONTRACTS.

§ 73. Validity in general.

The contract of a lunatic, whether express or implied, will be upheld when not tainted with fraud, and when it results to his benefit and advantage.

Bannings v. Hays, 9 Ky. Opin. 265.

A lunatic or person of weak mind who has been imposed upon by an artful and shrewd business man in the sale or purchase of property will always be protected by a court of equity; still, if the purchase is made in good faith and a fair and full con-

sideration paid, the transaction will not be disturbed.

Stevens v. Snowden, 13 Ky. Opin. 1055.

IX. ACTIONS.

§ 87. Capacity to sue and be sued in general.

No one has a right to institute or prosecute a suit for an insane person, until such person has been judicially declared insane or of unsound mind, and a mere suggestion of insanity and an order of the court that a certain attorney prosecute the suit as next friend of plaintiff is not sufficient.

O'Daniel v. Flannigan, 6 Ky. Opin. 297.

§ 92. Parties.

A person has no right to use the name of a lunatic and maintain an action affecting him without the consent of the lunatic's trustee or at the instance of the court, when the commissioner fails to protect the interests of his ward.

Trunk's Committee v. Eastern Kentucky Lunatic Asylum, 13 Ky. Opin. 166.

§ 98. Evidence.

Insanity can not be presumed of a person who has never been judicially declared insane, but must be established by affirmative proof.

O'Daniel v. Flannigan, 6 Ky. Opin. 297.

§ 100. Judgment.

Where a defendant, before a suit was brought against him, had been found to be of unsound mind and sent to the lunatic asylum, and there is no evidence that he was served with process, or that a committee or guardian was appointed, it was error to render judgment against him.

Paul v. Paul, 8 Ky. Opin. 810.

INSOLVENCY.

I. CONSTITUTIONAL AND STATUTORY PROVISIONS.

§ 1. Insolvency laws.

§ 3.—Construction and operation in general.

II. PROCEEDINGS FOR DECLARATION OF INSOLVENCY AND SURRENDER OR SEIZURE OF PROPERTY.

(A) JURISDICTION AND COURSE OF PROCEDURE IN GENERAL.

§ 11. Property subject to jurisdiction.

(C) INVOLUNTARY PROCEEDINGS.

§ 25. Acts of insolvency.

§ 37. Adjudication.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF INSOLVENT'S ESTATE.

(C) PREFERENCES AND TRANSFERS BY INSOLVENT, AND ATTACHMENTS AND OTHER LIENS.

§ 61. Preferences.

(E) ACTIONS BY OR AGAINST ASSIGNEE OR TRUSTEE.

§ 99. Evidence.

(F) CLAIMS AGAINST AND DISTRIBUTION OF ESTATE.

§ 117. Priorities.

§ 118.—Rights of creditors in general.

V. RIGHTS, REMEDIES, AND DISCHARGE OF INSOLVENT.

§ 153. Order or decree as to discharge.

VI. APPEAL AND REVISION OF PROCEEDINGS.

§ 172. Appeal.

§ 182.—Review.

See Bankruptcy; Corporations, VIII. As element of fraudulent conveyance, see Fraudulent Conveyances, § 61.

Of estates, see Executors and Administrators, IX.

Preference of creditors by insolvent, see Fraudulent Conveyances, § 122.

I. CONSTITUTIONAL AND STATUTORY PROVISIONS.

§ 1. Insolvency laws.

§ 3.—Construction and operation in general.

Insolvency within the meaning of the Act of 1856 means inability to pay one's debts, and it is not enough to show that the debtor did not have property subject to execution in the county of his residence sufficient to pay all of his liabilities.

Barr v. Elder, 10 Ky. Opin. 390.

II. PROCEEDINGS FOR DECLARATION OF INSOLVENCY AND SURRENDER OR SEIZURE OF PROPERTY.

(A) JURISDICTION AND COURSE OF PROCEDURE IN GENERAL.

§ 11. Property subject to jurisdiction.

The law will not permit a debtor, after acquiring property by his skill, industry or credit, to secure to himself an estate by making his family the depository of the title for the purpose of defeating his creditors.

Miller v. Gray, 2 Ky. Opin. 101.

The law will not permit one, on becoming insolvent, to drop his own name and assume that of his wife as the head of his business, and thereby defy his creditors.

Miller v. Gray, 2 Ky. Opin. 101.

(C) INVOLUNTARY PROCEEDINGS.

§ 25. Acts of insolvency.

So long as debtors hoped to be able to pay their debts, and were in good faith endeavoring to do so, believing that they would eventually succeed in doing so, they can not be said to have been contemplating insolvency.

Kinney v. Hagnow, 6 Ky. Opin. 434.

Although the sale of the deceased's estate after his death shows that it was insufficient, at that time, to pay his debts; it does not necessarily follow that he was unable to pay them at the time he executed a mortgage.

Yowell v. Yowell, 5 Ky. Opin. 321.

The act of a debtor in procuring a creditor to bring attachment proceedings against him was held to be an act of insolvency.

Gray v. Sandorf & Myer, 6 Ky. Opin. 276.

The recording of a deed made by an insolvent is not an act of insolvency, but the execution of a deed is such an act of insolvency, and being fraudulent will pass all right and title to the creditors of the insolvent.

Adkinson v. Riley, 13 Ky. Opin. 340.

§ 37. Adjudication.

It is a well settled principle that a creditor has no enforceable claim on the capacity or personal service of an insolvent debtor, but the law will permit the debtor to appropriate the products of his industry and skill to the maintenance of his family.

Miller v. Gray, 2 Ky. Opin. 101.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF INSOLVENT'S ESTATE.

(C) PREFERENCES AND TRANSFERS BY INSOLVENT, AND ATTACHMENTS AND OTHER LIENS.

§ 61. Preferences.

Creditors, to whom property is assigned in contemplation of insolvency, can, under proper proceedings for that purpose, be held by the non-preferred creditors for the amount collected, but not by the obligors in an action on bond.

Millett v. Millett, 3 Ky. Opin. 431.

A mortgage not made in contemplation of insolvency and without a design to prefer some creditors to the exclusion of others does not come within the provision of the acts of 1856.

Bayne v. Smith, 1 Ky. Opin. 13.

The Statute of 1856 does not denounce the transfer of property in contemplation of insolvency as fraudulent, and, therefore, requires a creditor to claim the benefit of the transfer within six months from the delivery of the property or the recording of the transfer.

Deatherage v. Park, 1 Ky. Opin. 50.

The Statute of 1856 declares equality between creditors generally, and it makes a sale, mortgage, or lien to secure one creditor to the exclusion of others, when so made by the debtor in contemplation of insolvency and with a view of preference, to inure to the benefit of all.

Deatherage v. Park, 1 Ky. Opin. 50.

A mortgage by one to another contemporaneous to the former becoming

latter's debtor is within the exception of the Statutes of 1856.

Deatherage v. Park, 1 Ky. Opin. 50.

It never has been regarded by law as immoral for a bona fide creditor to secure his debt by vigilance on a failing creditor, nor is same denounced as fraudulent by our Acts of 1856.

Deatherage v. Park, 1 Ky. Opin. 50.

Where an insolvent debtor and his surety sell and convey the insolvent's real estate, to prefer debts upon which the surety is bound, the surety knowing of such insolvency and the purpose of the sale and receiving the consideration to carry out such purpose, the proceeds of such sale are subject to the payment of general creditors.

Griffith v. Beacker, 8 Ky. Opin. 246.

Where a conveyance of real estate is made by an insolvent in contemplation of insolvency and for the purpose of preferring a creditor, while the effect is to transfer all the property to all the creditors, whether the preferred creditor knew the purpose or not, still, where the purchaser is innocent and pays a fair consideration, the sale will not be set aside, but the court will direct the proceeds of such sale to be applied to pay all the creditors.

Griffith v. Beacker, 8 Ky. Opin. 246.

To render fraudulent against other creditors the act of preferring one creditor to another by an insolvent debtor, the fact of insolvency need not have been known to the creditor, since if the debtor knows of his insolvency and does an act resulting in preferring one of his creditors over others, such act is fraudulent and will be taken as a general assignment of all of his property for the benefit of all of his creditors.

Dean v. Sminner's Admr., 11 Ky. Opin. 302.

Whether an insolvent debtor be ignorant of the fact that he has no right to prefer one creditor to others, or knowing such fact designs to prefer,

if the debtor knows that he is insolvent he must be presumed to know that to secure one creditor in preference to another is fraudulent, and he will be taken to have designed that which necessarily follows from his own action.

Dean v. Skinner's Admr., 11 Ky. Opin. 302.

(E) ACTIONS BY OR AGAINST ASSIGNEE OR TRUSTEE.

§ 99. Evidence.

The Court of Appeals in dealing with sales in contemplation of insolvency, has frequently held that a man must be presumed to have an ordinary, intelligent knowledge of his pecuniary affairs, and this presumption may be strengthened by the facts.

Deatherage v. Park, 1 Ky. Opin. 50.

(F) CLAIMS AGAINST AND DISTRIBUTION OF ESTATE.

§ 117. Priorities.

§ 118.—Rights of creditors in general.

Where the claim of plaintiff for \$2,000 of the \$5,000 alleged to be owing him originated after the act of insolvency was committed and the writing evidencing it recorded, all pre-existing liabilities must first be satisfied.

Stoepler v. Merkle, 6 Ky. Opin. 585.

Where all the creditors of an insolvent agree that the debtor's property shall be taken by a trustee for the benefit of all the creditors, one of such agreeing creditors will not be allowed an advantage over the rest by reason of the sale of the real estate under his execution, since the proceeds of such a sale should be shared by all the creditors alike.

Dickinson v. Behr, 13 Ky. Opin. 67.

One creditor of an insolvent estate has no right to a judgment to sell enough of it to pay his debt in full.

Trumbo's Exr. v. Murphy, Tierman & Co., 13 Ky. Opin. 528.

Where a creditor residing in this state institutes his action to settle

an insolvent estate of a lunatic in the hands of a committee, and after the institution of such suit and while it is pending, attaches and sells the lunatic's real estate in the state of Illinois, securing a large sum of money, he may be required in this state to account for the same for distribution to all the creditors of such insolvent estate, and he is estopped by his suit here to claim all the money so received by his attachment.

Barclay's Com. v. Barclay, 13 Ky. Opin. 904.

V. RIGHTS, REMEDIES, AND DISCHARGE OF INSOLVENT.

§ 153. Order or decree as to discharge.

A judgment in the settlement of an insolvent estate should specify the names of the creditors and the amount which each is entitled to on distribution, or at least state the whole amount due and the per cent. to be paid thereon to each creditor.

Wintersmith v. Fairleigh, 12 Ky. Opin. 239.

VI. APPEAL AND REVISION OF PROCEEDINGS.

§ 172. Appeal.

§ 182.—Review.

Where there are accounts to settle, in a suit to settle an insolvent estate, the case should be referred to a master, and where this is not done the Court of Appeals will not undertake to enter into an investigation of the items involved.

Harrison & Shelby v. Barksdale's Admx., 8 Ky. Opin. 277.

INSTRUCTIONS.

See Assault and Battery, §§ 43, 96, 116; Attachment, § 380; Boundaries, § 41; Burglary, § 46; Contracts, § 353; Criminal Law, XII, G; Disorderly House, § 20; Ejectment, § 110; False Imprisonment, § 40; Forgery, § 48; Fraudulent Conveyances, § 309; Gaming, § 102; Guaranty, § 39; Homicide, VIII, C; Intoxicating Liquors, § 239; Larceny, § 69; Libel and Slander, § 124; Malicious Prosecution, § 72; Municipal Corporations, § 822; Negligence, §§ 137, 139; Prin-

cipal and Surety, § 162, 191; Railroads, § 447; Rape, § 59; Receiving Stolen Goods, § 9; Replevin, § 91; Robbery, § 25; Sales, §§ 364, 419; Sheriffs and Constables, § 171; Street Railroads, § 118; Trial, VII; Turnpikes and Toll Roads, § 49; Work and Labor, § 30.

Abstract propositions of law, see Criminal Law, § 813.

Action against bank, see Trial, § 244.

Action for breach of contract, see Contracts, § 353.

Action for breach of covenant, see Covenant, § 135.

Action for damages, see Damages, § 209.

As to excluded testimony, see Criminal Law, § 783½.

As to malice, see Criminal Law, § 1172.

Brought up on appeal by bill of exceptions, see Appeal § 546.

Common-law marriage, see Marriage, § 52.

Construing together, see Criminal Law, § 823.

Contests of will, see Wills, § 328.

Credibility of witnesses and weight of evidence, see Criminal Law, § 757, 785.

Degree of offense, see Criminal Law, § 795.

Duty to instruct as to the whole law applicable to criminal case, see Criminal Law, §§ 769, 814.

Exceptions to, see Appeal, § 263.

Erroneous instruction as ground for new trial, see New Trial, § 38, 39.

For injuries to passenger, see Carriers, § 321.

Further instructions after submission of cause, see Trial, § 312.

Giving undue prominence to testimony, see Trial, § 244.

Harmless error in giving, see Criminal Law, § 1172.

How made part of record, see Appeal, § 525; Criminal Law, § 1089.

In action for appointment of committee and to enjoin disposal of estate, see Drunkards, § 3.

In action involving boundary of land, see Boundaries, § 41.

Incorporating in bill of exceptions, see Exceptions, Bill of, § 18.

Objections and exceptions to, see Appeal, § 215.

Objections necessary to review on appeal, see Appeal, § 214.

Objections to oral instructions, see Appeal, § 214.

On defense of insanity, see Homicide, § 294.

Peremptory instruction, see Trial, §§ 135, 168.

Peremptory instruction in criminal prosecution, see Criminal Law, § 753.

Requests for, see Criminal Law, § 825; Trial, VII, E.

Review of on appeal, see Appeal, §§ 838, 1089.

Waiver of objections to, see Criminal Law, § 1038.

INSTRUMENTS.

See Alteration of Instruments; Lost Instruments.

INSURANCE.

II. INSURANCE COMPANIES.

(A) STOCK COMPANIES.

§ 34. Stockholders.

(B) MUTUAL COMPANIES.

§ 52. Incorporation, organization, and existence.

V. THE CONTRACT IN GENERAL.

(A) NATURE, REQUISITES, AND VALIDITY.

§ 131. Validity of oral contracts.

§ 144. Modification.

(B) CONSTRUCTION AND OPERATION.

§ 151. Construing together policy and accompanying papers.

VI. PREMIUMS, DUES, AND ASSESSMENTS.

§ 186. Payment of premiums.

§ 195. Levy and collection of assessment.

§ 198. Refunding or recovery of premiums or assessments paid.

VII. ASSIGNMENT OR OTHER TRANSFER OF POLICY.

§ 208. Validity of oral assignment.

§ 209. Form and requisites of assignment in writing.

VIII. CANCELLATION, SURRENDER, ABANDONMENT OR RESCISSION OF POLICY.

§ 247. Rescission by insurer.

IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

(A) GROUNDS IN GENERAL.

§ 252. Representations.

§ 253.—In general.

§ 254.—Falsity.

§ 255.—Materiality.

(B) MATTERS RELATING TO PROPERTY OR INTEREST INSURED.

§ 288. Other insurance.

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

(B) MATTERS RELATING TO PROPERTY OR INTEREST INSURED.

§ 323. Building becoming vacant.

§ 336. Additional insurance.

(C) MATTERS RELATING TO PERSON INSURED.

§ 341. Change in habits.

(E) NONPAYMENT OF PREMIUMS OR ASSESSMENTS.

§ 349. Default as ground of forfeiture in general.

§ 363. Rights of insured after default.

§ 370.—Actions.

§ 381. Form and requisites of express waiver.

§ 382.—In general.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

(B) INSURANCE OF PROPERTY AND TITLES.

§ 498. Value of property destroyed.

§ 500.—Valued policies.

XIV. NOTICE AND PROOF OF LOSS.

§ 542. Statements or proofs of loss of or damage to property.

§ 544. Production of documentary evidence.

§ 554. Estoppel or waiver as to notice and proofs or defects and objections.

§ 555.—In general.

XV. ADJUSTMENT OF LOSS.

§ 569. Agreement for appraisal or arbitration.

XVI. RIGHT TO PROCEEDS.

§ 584. Life or accident policy designating beneficiary.

§ 590.—Rights of creditors.

§ 591. Life policy for benefit of creditor.

XVIII. ACTIONS ON POLICIES.

- § 608. Nature and form of remedy.
- § 614. Defenses.
- § 615.—In general.
- § 618. Venue.
- § 628. Declaration, complaint, or petition.
- § 631.—Setting forth or annexing policy and accompanying documents.
- § 645. Issues, proofs, and variance.
- § 646. Presumptions and burden of proof.
- § 647. Admissibility of evidence.
- § 665. Weight and sufficiency of evidence.
- § 666. Amount of recovery.

XX. MUTUAL BENEFIT INSURANCE.**(D) FORFEITURE OR SUSPENSION.**

- § 755. Estoppel or waiver affecting right of forfeiture.

(E) BENEFICIARIES AND BENEFITS.

- § 779. Change of beneficiary.
- § 780.—Right to change in general.
- § 791. Amount of benefits.

II. INSURANCE COMPANIES.**(A) STOCK COMPANIES.****§ 34. Stockholders.**

A stockholder of an insurance company is not released from liability on his stock for claims of creditors of the company which accrued prior to the change in the object and name of the company by a vote of the majority of the directors and stockholders.

Weir v. Ralley, 7 Ky. Opin. 379.

Where the objects of an insurance company have been enlarged by a majority vote of the directors and stockholders, the non-consenting stockholders can not be held to the increased liability under the enlarged objects and operation of the company.

Weir v. Ralley, 7 Ky. Opin. 379.

(B) MUTUAL COMPANIES.**§ 52. Incorporation, organization, and existence.**

An association of persons for mutual protection against fire, to which a corporate charter has been refused, violates no law by assuming what

may be regarded as a corporate name. Commonwealth v. Eckstamper, 6 Ky. Opin. 686.

V. THE CONTRACT IN GENERAL.**(A) NATURE, REQUISITES, AND VALIDITY.****§ 131. Validity of oral contracts.**

Oral contracts for insurance may be enforced, but a specific and complete agreement must be established by a clear preponderance of the evidence before the court should hold the insurer bound.

Continental Ins. Co. v. Jenkins, 9 Ky. Opin. 147.

Mere conversations with an insurance agent on the street relative to taking out insurance, where no application for insurance was made and where the agent had no authority to make an oral contract of insurance, will not bind the insurance company to issue a policy of insurance.

Continental Ins. Co. v. Jenkins, 9 Ky. Opin. 147.

§ 144. Modification.

Where a tenant acting for himself and his landlord takes out a policy of insurance on a building and contents, the contents belonging to the tenant and the building to the landlord, and the policy is delivered to the tenant and is by its terms made payable to him, and he informs the agent of the facts of ownership, and the agent then amends the policy by making it payable to the landlord and tenant in proportion to the ownership of each, and the premium is paid, the company is not in a position to deny its liability on account of the policy being made payable to the two persons.

Bridgford v. Manhattan Fire Ins. Co., 8 Ky. Opin. 294.

(B) CONSTRUCTION AND OPERATION.**151. Construing together policy and accompanying papers.**

The terms of a contract of insurance are to be determined by an examination of the application and the policy and the receipt delivered by the company to the assured.

Curd v. Commonwealth Mut. Life Ins. Co., 8 Ky. Opin. 815.

VI. PREMIUMS, DUES, AND ASSESSMENTS.

§ 186. Payment of premiums.

Where one holds a policy as security for indebtedness, and the insured refuses to pay the premiums as they become due, the holder of the policy has the right to make the payments and hold the insured responsible therefor.

Whittaker's Admr. v. Howard, 7 Ky. Opin. 542.

An insurance company has the right to waive the payment of the whole premium in advance and to accept personal security therefor.

Curd v. Conn. Mutual Life Ins. Co., 7 Ky. Opin. 732.

The fact that the application for insurance contained a clause that the premium shall not be considered paid unless a receipt therefor shall be given and signed by the president or secretary, does not preclude the party from showing that it had been paid, although no receipt has been given.

Curd v. Conn. Mutual Life Ins. Co., 7 Ky. Opin. 732.

§ 195. Levy and collection of assessment.

The object of the charter in requiring the notice of assessments to be made public was that each member of the company might have an opportunity to inform himself of the fact, and after thirty days' publication the law will imply notice and hold the member to the consequences of nonpayment, although he had no actual notice of his duty to pay.

Merhoff v. Hope Ins. Co., 5 Ky. Opin. 110.

§ 198. Refunding or recovery of premiums or assessments paid.

Where a policy of insurance is forfeited by the violation of its terms by the insured, he can not recover the premiums paid thereon.

Sargel v. United States Fire & Marine Ins. Co., 5 Ky. Opin. 272.

VII. ASSIGNMENT OR OTHER TRANSFER OF POLICY.

§ 208. Validity of oral assignment.

Where a policy provides that "if

this policy shall be assigned before a loss without the consent of the company indorsed hereon" the policy shall be void, it is held that although parties may agree that a contract reduced to writing shall not be modified unless the agreement for such modification be by writing, still a subsequent agreement by parol to modify will be valid; and where it is shown that the company, by its agent, agreed to the assignment of the policy by parol the company is bound by it.

Home Ins. Co. of New York v. Gaddis & Co., 10 Ky. Opin. 18.

§ 209. Form and requisites of assignment in writing.

One holding a certificate or policy by which the company, upon condition of certain payments, stipulate to pay his daughter certain sums of money at his death, may by will legally require said sums of money to be divided between his two daughters, since his will is held to be an assignment pro tanto.

Harrison v. Harrison, 10 Ky. Opin. 386.

VIII. CANCELLATION, SURRENDER, ABANDONMENT OR RESCISSION OF POLICY.

§ 247. Rescission by insurer.

An illegal cancellation of a policy will in no manner protect insurer against responsibility on account of the loss of the insured's property by fire.

Kentucky Insurance Company v. Jones, 2 Ky. Opin. 545.

IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

(A) GROUNDS IN GENERAL.

§ 252. Representations.

§ 253.—In general.

While an insurance company is not bound to pay on a policy that was procured by false representations made by the insured, it is bound when the evidence discloses that such representations were substantially correct and true.

Mississippi Valley Life Ins. Co. v. Morton, 8 Ky. Opin. 866.

§ 254.—Falsity.

An insurance policy is not collectible, when to induce the company to issue the policy the insured makes false statements, and when one not the owner of the building, knowing that fact, represents that he is the owner in order to secure a fire insurance policy; and the fact that the company's agent knew such fact will not of itself prevent the company from defending on account of such representations.

Mayes v. Hartford Fire Ins. Co.,
11 Ky. Opin. 534.

§ 255.—Materiality.

No statement, whether false or true, contained in an application will avoid an insurance policy unless it was material to the risk.

Connecticut Mut. Life Ins. Co. v.
Moss, 12 Ky. Opin. 651.

(B) MATTERS RELATING TO PROPERTY OR INTEREST INSURED.**§ 288. Other insurance.**

Where it is stipulated in a fire insurance policy that no additional insurance in any other company shall be carried on the property insured, and that if such additional insurance shall be procured without the consent of the company the first policy shall be void, and the insured obtains such other policy without such consent, such policy is void.

Suggs v. Liverpool & London &
Globe Ins. Co., 10 Ky. Opin.
559.

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.**(B) MATTERS RELATING TO PROPERTY OR INTEREST INSURED.****§ 323. Building becoming vacant.**

Where a fire insurance policy provides that the company shall not be liable where loss occurs when the building insured is vacant, the insured can not collect on such a policy when

the building was vacant at the time of the fire and for weeks prior thereto.

Aetna Insurance Co. v. Burns, 8
Ky. Opin. 219.

§ 336. Additional insurance.

Where plaintiff accepted the policy with the proviso therein, "that in case the assured shall already have made other insurance, or may hereafter make other insurance on the hereby insured premises, notice of the same shall forthwith be given to this corporation," and the day after appellant had effected insurance in appellee he had the same property insured in another company without giving appellee notice thereof, the acts of plaintiff forfeited the policy he held in defendant company.

Sargel v. United States Fire &
Marine Ins. Co., 5 Ky. Opin.
272.

(C) MATTERS RELATING TO PERSON INSURED.**§ 341. Change in habits.**

Where the holder of a life insurance policy, after receiving it, becomes so far in the habit of drunkenness that he is afflicted with delirium tremens, the policy is forfeited and there can be no recovery upon it.

Aetna Life Ins. Co. v. Sullivan,
9 Ky. Opin. 43.

(E) NONPAYMENT OF PREMIUMS OR ASSESSMENTS.**§ 349. Default as ground of forfeiture in general.**

Actual notice of assessment was all that the charter required, and if appellant neglected to pay the same, he must be regarded as electing to suspend his right to collect his policy of insurance, such suspension being an essential part of the contract.

Bronger v. Hope Insurance Company, 5 Ky. Opin. 18.

Where the charter provides that if a member neglects to pay an assessment for thirty days after it should become payable, he is excluded from all benefits under his insurance, it constitutes notice of the contract between the company and the member and is in no sense a forfeiture of his

interest in the company, but it is an equitable limitation on the right of the first to break the covenant to recover on it.

Merhoff v. Hope Ins. Co., 5 Ky. Opin. 110.

Where a life insurance policy provides that failure to pay a premium when due renders the policy void, and it is shown that such failure occurred, there can be no recovery on such policy.

Southern Mut. Life Ins. Co. v. Downs, 8 Ky. Opin. 879.

§ 363. Rights of insured after default.
§ 370.—Actions.

Where in a suit on an insurance policy, the company claims a forfeiture on account of a failure to pay a premium, the burden is on the plaintiff to show that the right to forfeit had been waived by the company, or that the agreement, if any was made, to extend the time of payment had been waived by the company.

Southern Mut. Life Ins. Co. v. Downs, 8 Ky. Opin. 879.

§ 381. Form and requisites of express waiver.

§ 382.—In general.

The insurance company may waive the payment of a premium when due, or it may insist that the contract of insurance had terminated by the failure to pay premium when due; but the company can not compel the insured to keep the policy alive by the payment of the premium, and the insured could not compel the company to accept payments after the time it became due.

Curd v. Commonwealth Mut. Life Ins. Co., 8 Ky. Opin. 815.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

(B) INSURANCE OF PROPERTY AND TITLES.

§ 498. Value of property destroyed.

§ 500.—Valued policies.

The presumption can not be indulged from the fact that the applicant has inserted an estimated value of the property, that the policy is a valued policy, thus closing all investi-

gation as to the amount of the loss, since a valued policy must be a matter of contract.

Phoenix Ins. Co. v. Hugh Haynes, 7 Ky. Opin. 643.

A valued policy is one in which the value of the property insured has been agreed upon by the parties, and the agreement inserted therein, such valuation being in the nature of liquidated demands, and in case of total loss, no proof of actual damages is admissible.

Phoenix Ins. Co. v. Hugh Haynes, 7 Ky. Opin. 643.

XIV. NOTICE AND PROOF OF LOSS.

§ 542. Statements or proofs of loss of or damage to property.

The failure of an insurance company to require exact proof of loss, and the reliance upon the failure to pay the premium promptly, was a waiver of the requirement in the policy as to the manner of the proof of loss.

Continental Insurance Co. v. Randolph, 11 Ky. Opin. 125.

In case of a fire consuming all the goods in a store room and all the books and accounts of the insured, proof by the insured and his clerk by affidavits showing such fact and the amount and value of property destroyed, according to their recollections, is sufficient, especially where the company is defending on another ground.

Aetna Ins. Co. v. Strickle, 11 Ky. Opin. 417.

§ 544. Production of documentary evidence.

The insured's right of recovery is not affected by its failure to produce its books, where it is shown that the books were destroyed.

United Life, Fire & Marine Co. v. Von Borles, 6 Ky. Opin. 644.

§ 554. Estoppel or waiver as to notice and proofs or defects and objections.

§ 555.—In general.

Where proof of loss was not made out in exact accordance with the policy, but the insurer did not call

upon the insured to correct it, and the insurer retained the proof of loss for three months without objection, the insured had the right to conclude that mere formal objection would not be insisted upon.

United Life, Fire & Marine Co. v. Von Bories, 6 Ky. Opin. 644.

Where an insurance company refuses to pay a loss on other grounds than its failure to receive notice and proof of loss, and goes into court asking for a cancellation of the policy, it can not justify itself by showing that proper proof had not been made of such loss.

Home Ins. Co. of New York v. Gaddis & Co., 10 Ky. Opin. 18.

XV. ADJUSTMENT OF LOSS.

§ 569. Agreement for appraisal or arbitration.

A written stipulation in an insurance policy that where a difference shall arise relative to the amount of the loss and there is no fraud suspected, such difference shall be submitted to arbitration, does not require that any other question concerning recovery on the policy shall be submitted to arbitration.

Royal Ins. Co. v. Waters, 8 Ky. Opin. 772.

XVI RIGHT TO PROCEEDS.

§ 584. Life or accident policy designating beneficiary.

§ 590.—Rights of creditors.

Creditors of the husband have no cause of action against a widow who has received insurance money on a policy made payable to her, purchased by her husband.

Smith v. Eubank, 8 Ky. Opin. 780.

§ 591. Life policy for benefit of creditor.

Where a creditor holds a policy on the life of his debtor as security for the debt, under a contract whereby the insured has an interest in the policy, the administrator of the insured is entitled to the fund arising out of the policy subject to the claim of the creditor.

Whittacker's Admr. v. Howard, 7 Ky. Opin. 542.

Where a debtor has taken out insurance to secure his indebtedness, and after a fire has collected the insurance, it should be prorated among all creditors.

Boyd v. Tabb, 13 Ky. Opin. 1008.

XVIII. ACTIONS ON POLICIES.

§ 608. Nature and form of remedy.

An action founded upon an insurance policy executed and delivered, and also upon a contract for insurance not evidenced by a policy is cognizable in the common-law court, and should be instituted and prosecuted on the ordinary docket.

Maloney v. St. Louis Mut. Life Ins. Co., 6 Ky. Opin. 270.

§ 614. Defenses.

§ 615.—In general.

Where an insurance company refuses to pay a loss because it claims that the insured burned the property insured, the failure of the insured to make proper proof of loss within a reasonable time can not be relied upon as a defense.

Aetna Ins. Co. v. Strickle, 11 Ky. Opin. 417.

§ 618. Venue.

Where an insurance company which had not complied with the law of Kentucky, executed a policy to a citizen, executed a policy to a citizen of Kentucky, took her premium note therefor and delivered the policy to her in the state of Ohio, recovery may be had on such policy either in the state of Ohio or in Kentucky.

Bowen v. National Ins. Co., 7 Ky. Opin. 653.

§ 628. Declaration, complaint, or petition.

§ 631.—Setting forth or annexing policy and accompanying documents.

Where a suit is instituted on an insurance policy and the insurance company obtained a rule against the plaintiff to file the policy, it is a sufficient excuse under Civ. Code 1876, § 120, for the plaintiff to show that the policy was not and never had been in her possession or under her control, that it was in the possession and under the control of another in a foreign state, and that plaintiff had made ef-

forts to obtain it but had been unable to do so.

Bacon's Admx. v. Mutual Benefit Life Ins. Co., 12 Ky. Opin. 693.

§ 645. Issues, proofs, and variance.

A variance between the policy and the application as to the description of the property is unavailable to the company, it being its duty in filling out the policy to describe it to a common intent; for which error they are at fault, and not the insured.

Kentucky Insurance Company v. Jones, 2 Ky. Opin. 545.

§ 646. Presumptions and burden of proof.

The burden is on an insurance company, when it charges the insured with having made false representations to induce the company to insure his life, to prove the falsity of such representations, and while representations so made are warranties they will not be extended by implication to cover a state of case not clearly within the purview of the question asked.

St. Louis Ins. Co. v. King, 9 Ky. Opin. 156.

§ 647. Admissibility of evidence.

A statement by an insurance agent to a third party that plaintiff was insured and that there would be no trouble about his insurance, was held not evidence against the insurance company.

Maloney v. St. Louis Mut. Life Ins. Co., 6 Ky. Opin. 270.

§ 665. Weight and sufficiency of evidence.

The evidence was held not to show that a note given by the applicant for life insurance premium was accepted by the agent of the insurance company in satisfaction of the payment of the first premium, such payment being a condition precedent to the delivery of the policy; and held also that there was not sufficient evidence of a waiver of the cash payment of the first premium.

Mississippi Valley Life Ins. Co. v. Newman, 6 Ky. Opin. 638.

Where an officer of an insurance company swore that the policy in question was never renewed, a clip off the margin at the foot of the application

is not sufficient to warrant the assumption that the margin was clipped to conceal the fact of the indorsement of a renewal of the policy.

Maloney v. St. Louis Mut. Life Ins. Co., 6 Ky. Opin. 270.

§ 666. Amount of recovery.

In an action on a fire policy which is not a valued policy, the insurer is only bound to make good the amount of the loss, and it was error to instruct the jury that if the property was totally destroyed and the finding is for the insured the verdict should be for the full amount of the policy.

Phoenix Ins. Co. v. Haynes, 7 Ky. Opin. 643.

XX. MUTUAL BENEFIT INSURANCE.

(D) FORFEITURE OR SUSPENSION.

§ 755. Estoppel or waiver affecting right of forfeiture.

Where a policy holder in a mutual insurance company under the rules of the company is required on notice of the death of a member to make a small designated payment to the company within thirty days, and fails to do so, his membership may be forfeited and can only be reinstated by payment accepted, together with certificate that the member is in good health; but where the company, after such right to declare a forfeiture continues to send notices to a member of assessments and continues without question or certificate to accept payments from the member, it thereby waives its rights thereafter and after the death of the member to set up such forfeiture to defeat the beneficiaries under the policy from recovery.

National Mutual Benefit v. Jones, 13 Ky. Opin. 1084.

(E) BENEFICIARIES AND BENEFITS.

§ 779. Change of beneficiary.

§ 780.—Right to change in general.

Where a house on mortgaged real estate is insured against fire, and burns, the mortgagor is entitled to the money collected from the insurance

company, where no agreement exists between the parties that it shall be payable to the mortgagee.

The Clay Fire & Marine Ins. Co.
v. Hickman, 12 Ky. Opin. 738.

§ 791. Amount of benefits.

Where the charter of the Kentucky Masonic Mutual Life Insurance Company provides what disposition is to be made of the fund due from the corporation on account of membership, such provision governs in preference to the will of the member, and the widow can not recover from the company no more than the share provided for widows, notwithstanding that the terms of her husband's will gave her a larger share.

Kentucky Masonic Mut. Life Ins.
Co. v. Gates, 10 Ky. Opin. 302.

INSURER.

Common carrier insurer of goods shipped, see Carriers, § 108.

INTENT.

See Forgery, § 5.

An element of larceny, see Larceny, § 3.

Felonious intent, see Larceny, § 3;
Fraudulent Conveyances, § 198.

In alteration of instrument, see Alteration of Instruments, § 11.

Of breaking, see Burglary, § 31.

Of debtor, see Assignments for Benefit of Creditors, § 107.

Of parties to contract, see Contracts, § 147.

Of testator, see Wills, §§ 438, 440.

Parol evidence of, see Evidence, § 461.

To defraud, see Fraudulent Conveyances, §§ 63, 68.

To make advancements, see Descent and Distribution, § 98.

To revoke will, see Wills, § 170.

Evidence of, see Evidence, § 108.

INTEREST.

I. RIGHTS AND LIABILITIES IN GENERAL.

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§ 2. What law governs.

§ 6.—Express contracts.

§ 8. Compensation for use of money.

§ 10.—Loans and advances.

§ 11.—Money received for use of another.

§ 20. Funds in litigation or in custody of the law.

§ 23. Time when interest accrues.

II. RATE.

§ 28. What law governs.

§ 31. Liabilities subject to statutory rate.

§ 32. Stipulations as to rate.

§ 35.—Statement as to rate in contract.

§ 36.—Construction and operation.

§ 37. After maturity of debt.

III. TIME AND COMPUTATION.

§ 39. Time from which interest runs in general.

§ 41. Stipulations as to time.

§ 42.—Payment of debt with interest in general.

§ 46. Demand for payment of principal.

§ 48. Suspension.

§ 56. Mode of computation in general.

§ 60. Compound interest.

IV. RECOVERY.

§ 61. Interest as incident to principal.

§ 64. Pleading.

§ 65.—Allegations as to interest.

See Usury.

Calculation of interest, see Bills and Notes, § 125.

On account, see Account, § 1.

Liability of guardian for interest on ward's money, see Guardian and Ward, § 54.

Promise to pay interest, see Bills and Notes, § 125.

When chargeable against executor or administrator, see Executors and Administrators, § 478.

I. RIGHTS AND LIABILITIES IN GENERAL.

§ 1. Nature and grounds in general.

Interest on notes or bills of exchange is chargeable at the rate in force in the state where the debt is payable, and this should apply to judgment of foreclosure.

Ross v. Brannin, Summers & Co.
3 Ky. Opin. 528.

§ 2. What law governs.

When payments are given upon property, either by will or deed, the ordinary meaning attached to such language would be, that the payments were to bear no interest.

Coons v. Coons, Exr., 4 Ky. Opin. 663.

§ 6.—Express contracts.

Rent after it is due carries interest like other obligations originating in contract.

Lowe v. Thornton's Heirs, 1 Ky. Opin. 8.

§ 8. Compensation for use of money.**§ 10.—Loans and advances.**

Where a commission merchant advances money to his customer to be used in buying and shipping to him tobacco to sell on commission, he receiving only the commission, in a settlement of this account he is entitled to recover interest on his money thus advanced.

Boughner v. Brooks, 13 Ky. Opin. 950.

§ 11.—Money received for use of another.

A trustee of a fund to be applied to a certain purpose can not be allowed to hold the trust fund for fifteen or twenty years without making the application of the fund and avoid payment of interest thereon.

Stewart's Exr. v. Stewart, 7 Ky. Opin. 123.

§ 20. Funds in litigation or in custody of the law.

Where, by a consent order, a party was permitted to withdraw money paid into court and use it, he must account for interest thereon.

Smith v. Donley, 7 Ky. Opin. 616.

§ 23. Time when interest accrues.

Where a contract provides for the payment of interest until maturity, there is no agreement to pay interest annually; and after the maturity of an obligation to pay money it will only bear legal interest unless there is an express agreement.

Colcored v. Arnold's Committee, 10 Ky. Opin. 100.

II. RATE.**§ 28. What law governs.**

Where plaintiff fails to offer evidence as to the place where the notes were executed, it is error to adjudge 10 per cent. interest on the debts.

Moberly v. Moberly, 6 Ky. Opin. 77.

§ 31. Liabilities subject to statutory rate.

In an action to enforce a vendor's lien, it was held that interest may be allowed at the rate of eight per cent. per annum.

Estill v. Blackwell, 7 Ky. Opin. 21.

The burden of proof is on the party charged with a debt created in another state to show the rate of interest where the note or contract was executed.

Chalfant & Morris v. Asbury, 5 Ky. Opin. 241.

Where the note sued on was executed in the state of Ohio, and appellants insist that no judgment could be rendered for the interest without first ascertaining, without proof, the rate of interest in that state, any indebtedness incurred or evidenced by judgment or decree rendered out of this state shall be presumed, unless the contrary be shown, to bear like interest as if it had been incurred in this state.

Chalfant & Morris v. Asbury, 5 Ky. Opin. 241.

Where a promise in a note is to pay ten per cent. interest from date, the note after its maturity will draw only the legal rate of interest.

McDonald v. Green, 12 Ky. Opin. 62.

In the distribution of a debtor's estate, sureties who have paid the debtor's debts and are preferred by a mortgage are not allowed ten per cent. on their claim, but they are entitled only to the legal rate of interest.

Bristow v. Peters, 12 Ky. Opin. 750.

§ 32. Stipulations as to rate.

A rate of interest of 10 per cent., promised in a purchase-money note, is not for the loan or forbearance of money or other thing; but is as much

a part of the same as the principal itself.

Carter v. Kinslair, 1 Ky. Opin. 322.

In a suit on a note, plaintiff can not recover ten per cent. interest by showing that defendant promised to pay that rate, where the agreement was not in writing.

Choice v. King, 8 Ky. Opin. 115.

§ 35.—Statement as to rate in contract.

Where a note is drawn one day after date with 10 per cent. interest from date, it will be held that the parties intended to contract for that rate from date until paid, there being no appreciable time between the date of the note and the time it becomes due.

Moore v. Miller, 10 Ky. Opin. 736.

§ 36.—Construction and operation.

Where a note, as originally executed, called for six per cent. interest, and on renewal, and before the law increasing the rate of conventional interest went into effect, the maker, in consideration of the renewal, agreed to pay ten per cent. interest, recovery can only be had for six per cent. interest.

Henry v. Davis, 7 Ky. Opin. 315.

Where a judgment drawing ten per cent. interest is replevied, the replevin bond may be legally taken drawing the same rate of interest.

Goar v. Louisville Bank Co., 9 Ky. Opin. 114.

§ 37. After maturity of debt.

Where a note due in one year with ten per cent. interest from date is not paid when due, it will only draw six per cent. interest after due, for the reason that the maker did not contract to pay any interest after the note should become due, or until it should be paid.

Giffin's Exr. v. Barnes, 8 Ky. Opin. 783.

Where the makers of a note agree to pay ten per cent. interest from date until the note is due, there is no promise to pay such rate after due, and the holder can only recover six per cent. interest after maturity.

Heinrich v. Booker, 8 Ky. Opin. 811.

A note bearing ten per cent. interest, not providing that it shall draw such interest from date until paid, only draws the legal rate of interest from the date of its maturity, and it is error to compute ten per cent. interest thereon after judgment.

Spradling v. Hazelrigg's Admr., 10 Ky. Opin. 709.

Where a note is executed on a named day, and made payable one year after date with ten per cent. interest from date, it is error to enter judgment for ten per cent. from the date of the note until a time long after its maturity; but judgment should have been entered for the principal and interest at the named rate for one year and with six per cent. interest thereafter.

Cottrell v. Barnes, 10 Ky. Opin. 901.

In the absence of a promise to pay a given rate of interest until the note is paid, it is the law that the note will draw the designated interest until maturity, and after maturity only the rate established by the statute.

Shanks v. Stephens, 13 Ky. Opin. 179.

III. TIME AND COMPUTATION.

§ 39. Time from which interest runs in general.

Where money is payable on demand, interest runs only from the date of the demand.

Shepperd v. Bowling, 6 Ky. Opin. 197.

A note providing, "not to be paid in money, but land at my death," will not carry interest until that contingency happens.

Miller v. Miller's Devises, 3 Ky. Opin. 552.

The money being due at the time the appellant entered and appropriated appellee's land, he is entitled to interest from that date.

Louisville & N. R. Co. v. Monin, 3 Ky. Opin. 405.

In a suit by the commonwealth for judgment against the sureties on a sheriff's bond, for back taxes assessed, interest should not be allowed on

same prior to the date of such bond.
Campbell v. Commonwealth, 3
Ky. Opin. 243.

In a suit for recovery of amount due for sale of a consignment of tobacco, interest should be allowed on the account from the time it should have been paid, and not from the date of filing the suit.

Roach v. Scott, 3 Ky. Opin. 90.

By the terms of the writing evidencing the sale as to appellant, the purchase money was not due appellee until he performed the conditions precedent of having the land run out and a sufficient deed made, and interest on the deferred payment did not begin to run until that was done.

Butts v. Hazelrigg, 5 Ky. Opin. 221.

Where land is to be paid for at the time the amount thereof is ascertained by survey, no interest is collectible prior to survey.

Woods v. Woods, 8 Ky. Opin. 6.

§ 41. Stipulations as to time.

§ 42.—Payment of debt with interest in general.

The contract expressed in a note dated and payable twelve months after date, with ten per cent. interest per annum, is a contract to pay interest at the named rate for twelve months from date, but not to pay such interest until the note is paid.

Cunningham v. Carrico, 11 Ky. Opin. 102.

§ 46. Demand for payment of principal.

A demand for money unlawfully collected not being necessary, interest should be allowed from the time the money was collected.

Nutter v. Miller, 7 Ky. Opin. 367.

§ 48. Suspension.

The deposit with the clerk of a fund owing, and part of which had been attached, without an order of court, will not stop the running of interest thereon, as to that part outside of amount attached.

Adams' Exr. v. Murray, 3 Ky. Opin. 115.

§ 56. Mode of computation in general.

A party can not be heard to complain of the manner of calculation of

interest, where he is required to pay a less sum than he owes.

Calhoun v. City of Paducah, 6 Ky. Opin. 482.

The legal manner to calculate interest on a note is down to the first payment; and, if the payment be equal to or larger than the interest, apply the payment first to the discharge of the interest and the remainder to a discharge of the principal, as a creditor has the legal right to have the interest discharged before the principal shall be reduced.

McCormick v. Morton, 1 Ky. Opin. 504.

If interest is charged and paid on a debt at the rate of ten per centum per annum, it is right to allow interest at this rate on payments made.

Austin v. Bullitt, 3 Ky. Opin. 47.

§ 60. Compound interest.

When installments of interest, which are specified in an obligation, mature, they become subsisting debts then due, with attributes of principal, and carry interest as such.

Tinsley v. Fielder's Admr., 2 Ky. Opin. 229.

IV. RECOVERY.

§ 61. Interest as incident to principal.

If plaintiff can recover on a promise to pay a debt after discharge in bankruptcy, he is entitled to recover interest as well as principal.

Worsham's Admr. v. Miller, 8 Ky. Opin. 19.

§ 64. Pleading.

§ 65.—Allegations as to interest.

Where in a suit interest claimed does not exceed the rate allowed by Kentucky statutes, it is not necessary for the creditor to aver and prove the laws of the place of the contract; since, if by those laws the contract is usurious, that fact must be set up by the defendant as a defense.

Bennett v. Brown, 9 Ky. Opin. 162.

INTERLOCUTORY ORDERS.

Appeal from, see Appeal, § 67.

INTERPLEADER.

How made part of record on appeal,
see Appeal, § 683.

INTERROGATORIES.

To jury, see Trial, IX, B.

INTERVENTION.

See Parties, § 37.

In attachment proceeding, see Attachment, §§ 280, 290.

Persons entitled to intervene, see Parties, §§ 40, 42.

INTOXICATING LIQUORS.**I. POWER TO CONTROL TRAFFIC.**

§ 5. States.

§ 6.—Legislative regulation.

III. LOCAL OPTION.

§ 28. Submission of question of adoption to popular vote.

§ 34.—Conduct of election.

§ 37.—Contests.

§ 38.—Resubmission after defective or invalid election.

§ 40. Operation and effect of adoption.

§ 41. Effect of change of boundary.

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§ 45. Statutory provisions.

§ 47. Subjects of license or tax.

§ 49.—Particular persons and occupations.

§ 50.—Clubs and associations.

§ 54. Necessity of obtaining license.

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§ 57. Eligibility for license.

§ 58.—Persons.

§ 59.—Places.

§ 62. Proceedings to procure license.

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§ 71.—Grant or refusal of license.

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§ 79. Conditions imposed on licensee.

§ 82. Bonds of dealers.

§ 87.—Liabilities of sureties.

§ 88.—Actions for breach.

§ 89. Fees and taxes.

§ 94.—Payment and collection.

§ 98. Nature of rights conferred.

§ 103. Transfer of license.

§ 105. Revocation or forfeiture of rights.

§ 106.—In general.

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§ 132. Applicability of provisions of statutes and ordinances in general.

§ 133. Liquors prohibited.

§ 134.—Description and properties.

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XI. CIVIL DAMAGE LAWS.

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I. POWER TO CONTROL TRAFFIC.

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The legislature in the exercise of the police power of the commonwealth.

may by enactment regulate the sale of intoxicating liquors when it determines that such sales are detrimental to public morals, and the act of May 5, 1884, entitled "An act to prohibit the sale of spirituous, vinous and malt liquors in Hardin county" is not in violation of the state constitution.

Griffin v. Commonwealth, 13 Ky. Opin. 643.

While the legislature has the power to regulate the sale of liquors to be used as a beverage, or to prohibit its sale for that purpose altogether, it can not exercise that power so arbitrarily as to prohibit the use or sale of it as medicine, but the legislature has the power to prohibit the sale of liquors to be used as a beverage only because the health, peace and order of society require it.

Sarrls v. Commonwealth, 13 Ky. Opin. 714.

III. LOCAL OPTION.

§ 28. Submission of question of adoption to popular vote.

§ 34.—Conduct of election.

The constitution provides that elections shall be held between 6 o'clock a. m. and 7 o'clock p. m., but it does not follow that the result is unlawful where the polls are not opened until after six o'clock.

Cochran v. Hays, 8 Ky. Opin. 503.

§ 37.—Contests.

An election held in a given district to determine whether intoxicating liquors shall be sold therein can not be contested under the provisions of the general election law.

Cochran v. Hays, 8 Ky. Opin. 503.

§ 38.—Resubmission after defective or invalid election.

The law takes effect as soon as the certificate of the examining board is entered in the order book of the equity court.

Hodge v. Commonwealth, 11 Ky. Opin. 645.

The provisions of the local option law applies to all persons including distillers or manufacturers of such liquors, the sale of which is prohibited

by the law, whether licensed by the United States government or not.

Hodge v. Commonwealth, 11 Ky. Opin. 645.

§ 40. Operation and effect of adoption.

The granting of license to retail spirituous liquor is within the discretion of the county court, notwithstanding there has been a vote of the people on that question.

Brown v. Commonwealth, 5 Ky. Opin. 250.

§ 41. Effect of change of boundary.

Where the voters of a district have decided that liquors shall not be allowed to be sold therein, it is not within the power of the county court to nullify such action by changing the boundaries of a district so as to authorize sales to be made in territory in which they have been prohibited by the people's votes; but under an indictment charging a sale in district No. 9 without alleging or specifying the boundary in which it was sold, so as to enable the court to know that a portion of district No. 9 was within the district No. 2 in which sales were prohibited, prima facie, the party had the right to sell if licensed in district No. 9.

Prater v. Commonwealth, 11 Ky. Opin. 578.

IV. LICENSES AND TAXES.

§ 45. Statutory provisions.

The statute expressly provides that unless the privilege to sell spirituous liquors is specified in the license the right to do so can not be implied.

Salmon v. Commonwealth, 9 Ky. Opin. 385.

While county courts, pursuant to the act of February 17, 1866, were authorized to take bonds of coffeehouse keepers, such courts were not authorized to grant coffeehouse licenses.

Millershipp v. Commonwealth, 9 Ky. Opin. 528.

Where, on March 8, 1871, the General Assembly repealed so much of the charter of the town of Catlettsburg as vested in its trustees the right to license the sale of liquors, but on March 29, 1882, the Legislature gave the trustees of said town the power

to tax the sale of liquors, and required that when such tax was paid the payor should execute a bond in the sum of \$2,000, conditioned that he would keep an orderly house and comply with the laws, it in effect gave the trustees the power taken from them by the former act, and since the latter act did not provide for the issuance of a license, it is held that paying the tax and giving the bond constitutes a license.

Gallagher v. Meek, 12 Ky. Opin. 348.

§ 47. Subjects of license or tax.

§ 49.—Particular persons and occupations.

It can not be implied from the fact that one has a license to keep a tavern that the licensee has a right to sell intoxicating liquors, since the right to sell liquors by a tavern keeper can only arise where the tribunal granting the license specifies the privilege to sell liquors in the license, and this can not legally be specified in a territory where the legislature has prohibited the sale of such liquors.

Commonwealth v. Edinger, 13 Ky. Opin. 826.

§ 50.—Clubs and associations.

Where a club room is maintained in which liquors are given to the members, who at the time of receiving them are required to sign a ticket and thereafter to pay the sum named on the ticket, and where visitors are for a time given the privilege of members in receiving liquors by signing tickets which they must redeem at the end of the time limit, it amounts to a sale of such liquors, for which license is required.

Pendennis Club v. City of Louisville, 13 Ky. Opin. 1102.

A license to sell intoxicating liquors does not preclude the holder thereof from selecting a particular class of persons as those to whom alone he will sell.

Pendennis Club v. City of Louisville, 13 Ky. Opin. 1102.

§ 54. Necessity of obtaining license.

§ 55.—In general.

Procuring a county license to sell intoxicating liquors gives no right to the holder to sell such liquors in a town, when the trustees of the town

in their discretion refuse to issue a license therefor.

Carey v. Board of Trustees, Town of Butler, 13 Ky. Opin. 388.

§ 57. Eligibility for license.

§ 58.—Persons.

Where a married woman has executed a bond with security provided by law, which has been accepted and approved, and has paid the amount of license tax fixed by town ordinance of Cave City, which has been accepted, and she offers to pay the state tax, the town may be mandated to issue to her a license, and such license can not be refused because the applicant is a married woman.

Caldwell v. Grimes, 13 Ky. Opin. 907.

§ 59.—Places.

A license to keep a tavern on a farm sufficiently designates the place and does not confine the privilege to any particular house, but only requires that it should be within the limits of the farm.

Commonwealth v. Smith, 1 Ky. Opin. 341.

A license to keep a tavern in a town sufficiently specified the place and operated as a personal franchise co-extensive with the boundary of the town, and as locomotive as the grantee himself, and would authorize the keeping of a tavern and the retailing of liquors in any house in that town.

Commonwealth v. Smith, 1 Ky. Opin. 341.

§ 62. Proceedings to procure license.

§ 69.—Questions considered and discretion as to grant of license.

The county court has a large discretion in the granting of a license for the keeping of a tavern, and such discretion will not be interfered with by the Court of Appeals, in the absence of a showing of abuse of discretion.

Adams v. Commonwealth, 6 Ky. Opin. 688.

Where, under the law and charter of a town, the trustees are given the discretion to issue or refuse to issue a license to sell intoxicating liquors, and they do in the exercise of such discretion refuse a license, their ac-

tion can not be controlled by mandate.

Carey v. Board of Trustees, Town of Butler, 13 Ky. Opin. 388.

§ 71.—Grant or refusal of license.

A judge of a county court may authorize a tavern-keeper to retail spirituous liquors when he shall deem it expedient to do so, and such action is subject to review only for abuse of discretion.

Commonwealth v. Goble, 7 Ky. Opin. 469.

A merchant, as the term is used under the liquor-license law, is a person whose business is that of retailing merchandise and one is not a merchant whose business it is to sell liquors alone, and before the county court is authorized to grant a license to a merchant to sell liquors, it must be satisfied that he has not assumed the name and business of a merchant with the view and object of obtaining a license to sell spirituous liquors.

Pence v. Commonwealth, 11 Ky. Opin. 593.

§ 75.—Appeal from decision.

Appeals from the judgment of a county court refusing to grant a tavern license should be prosecuted to the Court of Appeals.

Commonwealth v. Fague, 6 Ky. Opin. 731.

§ 79. Conditions imposed on licensee.

In granting a license to sell liquors the general assembly has a right to attach to it any conditions it may deem proper, and may hold the licensee responsible for the use made of intoxicating liquors sold by him, and where he accepts such a license he can not complain at being so held responsible.

Blick v. Commonwealth, 10 Ky. Opin. 335.

§ 82. Bonds of dealers.

§ 87.—Liabilities of sureties.

A surety on the bond of tavern keepers cannot be prosecuted under an indictment alleging an "offense of a breach of tavern bond," since a surety is not subject to indictment;

he can only be proceeded against under a civil action.

Keen v. Commonwealth, 2 Ky. Opin. 543.

§ 88.—Actions for breach.

A proceeding for breach of tavern keeper's bond, being a prosecution, not for a misdemeanor, but for a mere breach of his obligation to recover the statutory penalty, is not the subject of an indictment, which is an accusation by a grand jury charging a person with the commission of a public offense.

Keen v. Commonwealth, 2 Ky. Opin. 543.

§ 89. Fees and taxes.

§ 94.—Payment and collection.

In a suit to enforce payment for a license to sell liquor, the allegations in the petition must show that the town trustees had the lawful authority to require of defendant the sum alleged owing for the license and the defendant had promised to pay therefor.

Witty v. Edmonton, 2 Ky. Opin. 468.

§ 98. Nature of rights conferred.

The right to sell spirituous, vinous and malt liquors does not impliedly confer the right to keep a coffee house.

City of Louisville v. Templeton, 6 Ky. Opin. 630.

§ 103. Transfer of license.

One having obtained a license to retail spirituous liquors in a certain house, and not choosing to exercise the privilege himself, gave it to the appellee, who was indicted for retailing under such license, it was held that appellee had not violated the law against retailing spirituous liquors without a license.

Commonwealth v. Gill, 2 Ky. Opin. 136.

§ 105. Revocation or forfeiture of rights.

§ 106.—In general.

And an appeal from the judgment of the county court for suspending such license, being of a penal nature, should have been taken to the crim-

inal court, since the circuit court had no jurisdiction in such appeal.

Commonwealth v. Bright, 10 Ky. Opin. 684.

The county court is authorized by a lawful proceeding to suspend the license of a tavern keeper and deprive him of his business under it, but since March 13, 1876, when the general assembly created a criminal court for the counties of Fleming, Morgan, Nicholas, Lewis, Rowan and Greenup, and took away from the circuit courts of said counties jurisdiction in criminal cases or penal causes.

Commonwealth v. Bright, 10 Ky. Opin. 684.

VI. OFFENSES.

§ 132. Applicability of provisions of statutes and ordinances in general.

Where one holds a license as a merchant to sell liquor in quantities of not less than a quart, "to be taken off and drank elsewhere than on his premises or adjacent thereto," sells such liquors, and the purchaser takes them into the highway adjacent to the seller's premises and drinks them there, the seller is guilty of a violation of the statute against keeping a tipping house.

Blick v. Commonwealth, 10 Ky. Opin. 335.

The statutes prohibiting the sale of spirituous, vinous and malt liquors without a license, are not intended to interfere with the traffic of fruits preserved in liquors, but if under the pretense of selling fruits one should in fact be selling liquors he would be held liable.

Holland v. Commonwealth, 13 Ky. Opin. 599.

§ 133. Liquors prohibited.

§ 134.—Description and properties.

Where upon a charge for selling intoxicating liquors it is shown that the accused sold "Bitters," which the buyer drank as a beverage and which contained a large per cent. of alcoholic liquor, the jury is warranted in finding the accused guilty; and an instruction by the court to find him not guilty is erroneous, since the

cause should have been left to the jury to determine.

Commonwealth v. Minor, 10 Ky. Opin. 384.

§ 136.—Ingredients in medicinal preparations.

Where, in the trial of one charged with selling intoxicating liquors, it is shown by the evidence that "Grave's Bitters" were sold and drank by the purchaser as a beverage, and that such bitters contained a large per cent. of alcohol, the court should charge the jury that if the bitters contained alcoholic liquor and was so compounded as to render it fit for use as a beverage, they should find the defendant guilty, although they might believe it also contained drugs which made it also a medicine.

Commonwealth v. Minor, 10 Ky. Opin. 384.

§ 137. Manufacture.

Under § 118 of the charter of the city of Louisville, the right of a manufacturer of liquors to sell same as a merchant, does not give him the privilege of setting up and maintaining, free from municipal control, a coffee house, merely because he retails only liquors manufactured by him.

City of Louisville v. Templeton, 6 Ky. Opin. 630.

§ 146. Sale in general.

Where the proprietor of a place where intoxicating liquors are sold was present and saw his bartender sell liquor in violation of law, he is guilty the same as if making the sale himself.

Commonwealth v. Hardin, 8 Ky. Opin. 724.

It is no offense either at common law or under the statute to sell whisky in any quantity without license, unless the person so selling is a merchant or unless the liquor is sold to be drunk upon the premises or adjacent thereto.

Commonwealth v. Simrall, 11 Ky. Opin. 334.

One can be punished for selling liquor by retail when it was drunk upon adjacent premises, whether such

premises were under his control or not.

Varble v. Commonwealth, 11 Ky. Opin. 570.

In a charge against one for selling spirituous, vinous or malt liquors in Greenup county, under the provisions of 2 Sess. Acts (1878), ch. 1062, § 2, it is not necessary for the state to show that the defendant has been guilty of twice selling such liquor in order to convict, but it is competent to show any number of sales which he may have made to the person named in the indictment within one year prior to the finding of the indictment.

Bergmeyer v. Commonwealth, 11 Ky. Opin. 648.

§ 148. Sales in local option districts.

Under an indictment for selling spirituous liquors in a named district, evidence that the sale was made in another district should be excluded.

Prater v. Commonwealth, 11 Ky. Opin. 578.

§ 149. Sale without license.

An order of the court authorizing one to keep a tavern does not license such keeper to sell spirituous liquors; since the privilege of selling liquors can not be implied, and before the licensee is given such authority it must be specified in the license.

Gill v. King, 9 Ky. Opin. 873.

Any tavern keeper or merchant who sells spirituous liquors without having obtained a license to do so is guilty of violating the law.

Pence v. Commonwealth, 11 Ky. Opin. 593.

§ 150.—Dealers in general.

In a charge of selling spirituous liquors under Gen. Stat., ch. 92, art. 3, § 5, without a license, it is not necessary to set forth the fact showing that accused was a merchant within the meaning of the statute, nor that the sale was made in the line of his business as a merchant.

Vinnan v. Commonwealth, 10 Ky. Opin. 2.

A merchant is one who sells or deals in goods, wares and merchan-

dise, and it is not necessary that he should have a fixed place of business in order to be guilty of selling liquor as a merchant without a license, under the statute prohibiting such sales by unlicensed merchants.

Thernerling v. Commonwealth, 10 Ky. Opin. 9.

One not an employe or agent for the holder of license to operate a tavern can not, as a defense to a charge of keeping a tipping house without a license, rely upon the license of another to protect him, since the statute forbids the assignment of a license to retail liquors.

Higgins v. Commonwealth, 10 Ky. Opin. 436.

§ 152.—Druggists or physicians.

A defendant can not claim exemption from the penalty imposed by law against selling intoxicating liquors, because he is a physician.

McGlashen v. Commonwealth, 8 Ky. Opin. 237.

Compounds of medicines with alcoholic liquors, made in good faith as medicines for medical use and not as a device to avoid the law regulating or prohibiting the sale of liquors, are not prohibited by the law, and a druggist may make and sell them for use as medicine without violating the law.

Smithers & Higdon v. Commonwealth, 8 Ky. Opin. 574.

Where a druggist, a regular physician, kept the drug store himself and prescribed the liquors in good faith, he is not guilty of an unlawful sale even if he did not actually write out the prescription and preserve it as a protection from prosecution.

Commonwealth v. Matthews, 11 Ky. Opin. 385.

§ 153. Sales without giving bond.

Under § 1, Act. Feb. 17, 1866, Myer's Supp. 762, requiring a coffee house keeper to execute a bond before he can sell intoxicating liquor to any one, a license to sell liquor confers no authority to sell liquor without execution of such bond.

Heinze v. Commonwealth, 6 Ky. Opin. 205.

§ 154. Sales by licensees not authorized by license.

Although persons who purchased whisky of defendant may have had the legal right to drink it where they pleased, such defendant had no power to authorize them to drink it, nor to consent that they should drink it, in the public highway adjacent to his premises.

Pugh v. Commonwealth, 6 Ky. Opin. 696.

§ 155. Prescriptions by physicians.

In a prosecution for the unlawful sale of liquors, where the evidence shows that the sale was made by a licensed physician upon his own prescription for medical use only, it is error for the court to charge that he must be found guilty unless the evidence shows that he was a licensed druggist.

Sarrls v. Commonwealth, 13 Ky. Opin. 718.

A practicing physician may legally prescribe and sell liquors to his patients for medical use, and, so long as he acts in good faith, he can not be convicted for selling liquors unlawfully.

Sarrls v. Commonwealth, 13 Ky. Opin. 718.

§ 157. Sales or gifts to prohibited persons.

The selling of liquor to a minor without the written order of his parent, guardian, etc., is a personal offense by the one who actually sells, and does not make the landlord liable unless it can be proven by sufficient evidence that he knew of, or authorized, or assented to it.

Commonwealth v. Stell, 1 Ky. Opin. 624.

§ 159. To minors.

In a prosecution for unlawful sale of intoxicating liquor, accused can not prove facts tending to show that he had reason to believe the minor to be over 21 years of age.

Ochsner v. Commonwealth, 6 Ky. Opin. 179.

In an indictment for the unlawful sale of malt liquor to a minor without the written consent of the father

or guardian, it is not necessary to aver that such minor is not the child of the accused, especially where the surname of the child and father are not the same.

Ran v. Commonwealth, 9 Ky. Opin. 10.

§ 164. Sales in prohibited quantities.**§ 167.—In general.**

2 Session Acts (1878), ch. 1062, § 2, provides that it shall be a criminal offense to sell or dispose of any spirituous, vinous or malt liquors in Greenup county in less quantities than one-half gallon, and any such offenders will be deemed to have violated the general laws of the state against keeping a tippling house and subject to the penalties provided for such offenses.

Bergmeyer v. Commonwealth, 11 Ky. Opin. 648.

§ 166. Persons liable.

The statute prohibiting the sale of intoxicating liquors applies generally to all persons under twenty-one years of age, including those who have neither father, mother nor guardian.

Commonwealth v. Johnson, 4 Ky. Opin. 83.

A physician may make a sale of intoxicating liquors, if made in good faith and for medical purposes only, but such physician can not legally sell for any other purpose.

McGlashen v. Commonwealth, 8 Ky. Opin. 237.

§ 174. Continuing or separate offenses.

A person indicted for keeping a tippling house and acquitted on the charge, may on the same trial be found guilty of retailing spirituous liquors within one mile of a church during divine service, but he can not be convicted for more than one of the inferior offenses.

Jackson v. Commonwealth, 9 Ky. Opin. 115.

VIII. CRIMINAL PROSECUTIONS.**§ 199. Indictment, information or complaint.**

An indictment for the unlawful sale of intoxicating liquors, must state every fact necessary to give jurisdic-

tion, and where that is not done the court cannot assume the existence of any such facts.

Commonwealth v. Cooper, 5 Ky. Opin. 760.

An indictment for unlawfully selling liquors "to James McCourt, he the said James McCourt, Jr., then and there being a white person under the age of twenty-one years, and which said liquor so sold as aforesaid was * * * so sold by the said Closterman without either the written consent of the father, mother or guardian of the said James McCourt, Jr., or either of them," is held sufficient.

Closterman v. Commonwealth, 4 Ky. Opin. 85.

Where an indictment charged the keeping of a tippling house in Pendleton county, and defendant had a license to keep a tavern in the city of Falmouth; and his house was just outside the city limits, there was no license to operate a tavern.

Watson v. Commonwealth, 4 Ky. Opin. 329.

In an indictment for unlawfully selling intoxicating liquors to a certain minor, the plea that the indictment did not allege that the father of the minor is living, or is dead, as he was under the control of his mother or guardian can avail nothing.

Closterman v. Commonwealth, 4 Ky. Opin. 85.

§ 200.—Requisites and sufficiency in general.

In charging a sale or gift of spirituous and vinous liquors to intoxicated persons, it is necessary to name the persons.

Commonwealth v. Burschulz, 8 Ky. Opin. 471.

An indictment under the special Act of March 6, 1872, applying only to Rockcastle county, is insufficient which avers that "The said Brooks did * * * unlawfully sell to J. J. Williams, whisky and brandy by the quart, pint and half, said sale not being made in small quantities for medical purposes on the prescription of a regular practicing physician then and there made and given," since no prescription is necessary under such

act; but to justify such sale the purchaser must have a physician's certificate, and not a prescription.

Brooks v. Commonwealth, 10 Ky. Opin. 22.

An indictment for a violation of liquor law is good when the facts constituting the offense are stated substantially in the language of the statute.

Mays v. Commonwealth, 11 Ky. Opin. 229.

Where an offense, consisting of an unlawful sale of liquor, is charged with reasonable certainty as to the time and place of sale and the person to whom it is sold, the charge is good, and it is no objection that the particular kind of liquor sold is not specified, for if either kind or a mixture of either was sold, the offense was committed.

Commonwealth v. Knoerr, 11 Ky. Opin. 514.

An indictment for selling liquors is sufficient which charges the act of selling and specifies the time and place of sale, the quantity sold and the person to whom sold, and that the district wherein the act was committed was governed by the local option law; it is not necessary to allege negatively that the law had not been repealed.

Hodge v. Commonwealth, 11 Ky. Opin. 645.

§ 201.—Character, condition or occupation of accused.

In charging a sale of liquors to minors, such minors must be named and it must be averred that the sale was made without the special written direction of the father or guardian of such minor.

Commonwealth v. Burschulz, 8 Ky. Opin. 471.

§ 203.—Knowledge or notice.

In order to make an indictment good against a licensed liquor dealer for suffering spirituous liquors to be drunk in his saloon by one in the habit of becoming drunk, it must be charged that the accused knowingly suffered such liquors to be drunk in his saloon.

Commonwealth v. Dunn, 10 Ky. Opin. 321.

§ 208.—Time as element of offense.

An indictment for keeping a tippling house is not defective for failure to state the month in which the offense was committed, where it must have been committed, if at all, within the prescribed time.

Heinze v. Commonwealth, 6 Ky. Opin. 205.

§ 213.—Keeping place for unlawful sale or maintaining liquor nuisance.

An indictment for keeping a tippling house held sufficient whether drawn under the Revised Statutes or under the Act of March 21, 1871.

Commonwealth v. Shepperd, 7 Ky. Opin. 710.

§ 215.—Sale or gift.

It is not material whether intoxicating liquor be charged in an indictment to have been furnished by selling, giving or loaning, or whether it be proven to have been furnished in the manner charged; and if furnished to an inebriate at all the statute was violated, and a defendant is not misled to his prejudice by being charged with selling when in fact he gave or loaned it only.

Simms v. Commonwealth, 10 Ky. Opin. 434.

§ 225. Admissibility of evidence.**§ 235.—Matters of defense.**

A defendant charged with the unlawful sale of intoxicating liquors is not permitted to prove that before the sale was made it was the opinion of his employer that such a sale was legal.

Minnis v. Commonwealth, 8 Ky. Opin. 495.

A license to keep a coffee house issued by the town authorities is no protection against a prosecution by the state for the unlawful sale of intoxicating liquors.

Salmon v. Commonwealth, 9 Ky. Opin. 385.

§ 239. Instructions.

Under § 1, art. 4, ch. 99 (2 Rev. Stat., § 411), relating to the keeping of a tippling house, an instruction that if the jury believe from the evidence that defendant suffered or permitted his brother to sell whiskey in defend-

ant's house more than once in any quantity, which defendant suffered or permitted to be drunk in a house about forty yards from the place of sale, he is guilty of keeping a tippling house, and the jury should so find, in the absence of proof that accused was licensed to sell by the drink, is erroneous, since the liquor was not drunk on the premises where sold or on premises adjacent thereto.

Bondurant v. Commonwealth, 6 Ky. Opin. 45.

In a prosecution for selling liquor to a minor, an instruction that "the accused was required by the law to know that M. was a minor and that his ignorance as to his age, or the belief that he had reached the age of twenty-one years, could neither justify nor excuse the inhibited selling" was not erroneous.

Closterman v. Commonwealth, 4 Ky. Opin. 85.

An instruction in a prosecution for selling liquor to a minor that "the sale by an agent, authorized by accused to sell to the minor, was as much a violation of the law as though he had made the sale himself," is not erroneous.

Closterman v. Commonwealth, 4 Ky. Opin. 85.

An instruction in a case where the defendant was charged with suffering a named person, and others whose names were unknown to the grand jury, to drink and tipple in defendant's tavern house and on his premises more than was necessary, was held misleading which charges that if any of the persons named had been seen in defendant's tavern drunk or in a state of intoxication the law presumes that they were made so by drinking and tipping at defendant's bar and they should find him guilty unless they should further believe from all the proof that they obtained the liquor and drinks from other places, and if they shall so believe they should acquit; and it is not incumbent on the defendant to prove where persons drunk in his house got the liquor which caused their intoxication in order to escape the prima

facie presumption that the liquor was drunk in his house; but it is enough if he proves that they did not get it or drink it in his house.

Doty v. Commonwealth, 9 Ky. Opin. 539.

An instruction telling the jury that it should convict if it believed from the evidence that the defendant within one year before the return of the indictment sold to a named person any whisky, brandy, wine, gin or alcohol, or mixture thereof, without a written prescription given by a regular practicing physician, is not erroneous, since it is more favorable to the defendant than the statute authorized and he can have no objection to it.

Mays v. Commonwealth, 11 Ky. Opin. 229.

In the trial of a person charged with unlawfully selling and giving to another spirituous, vinous and malt liquors without license, under the Act of April 8, 1882, ch. 916, it is error for the court to refuse a requested instruction, that "if the jury believe from the evidence that the defendant was at the time of letting Stewart have the whisky, a practicing physician within the limits of the town of New Castle, and in good faith prescribed the whisky to said Stewart as a medicine, they must find for the defendant."

Sarrls v. Commonwealth, 13 Ky. Opin. 714.

§ 241. Appeal.

The defendant charged with an illegal sale of liquor is not prejudiced by the refusal of the court to permit the prescription of a physician to be read as evidence, especially since such prescription was not identified by the party buying the liquor.

Burton v. Commonwealth, 9 Ky. Opin. 297.

XI. CIVIL DAMAGE LAWS.

§ 306. Pleading.

1 Acts (1878), p. 30, ch. 319, neither imposes a penalty nor authorizes a recovery of damages in selling liquors, except where the seller has a license to sell such liquors, and it follows that a petition for damages under said

act must allege that the sale was made and that the seller at the time had a license to sell.

Howser v. Watson, 11 Ky. Opin. 324.

INTOXICATION.

As defense, see Homicide, § 28.

Proof of to rebut inference of malice, see Homicide, § 180.

Respecting validity of contract, see Contracts, § 92.

INVENTORY.

Failure of administrator de bonis non to file, see Executors and Administrators, § 62.

INVESTMENTS.

By personal representatives of deceased person, see Executors and Administrators, § 101.

Of ward's money by guardian, see Guardian and Ward, § 53.

IRREGULARITIES.

In judicial sales, see Judicial Sales, § 37.

ISSUES.

Immaterial issues, see Pleading, § 371.

JAILS.

See Prisons.

Compensation of jailer, see Prisons, § 18.

Duties of jailer, see Prisons, § 4.

Duty of county to provide, see Prisons, § 1.

Indictment of jailer for permitting escape, see Escape, § 9.

Liability of accused for board during confinement, see Costs, § 292.

JEOPARDY.

See Criminal Law, VII.

Discharge of jury without verdict, see Criminal Law, § 181.

Plea of former jeopardy, see Criminal Law, § 292.

JOINDER.

See Action, III.

Of causes of action, see Action, §§ 43, 45, 46.

Of counts in indictment, see Indictment and Information, §§ 97, 126.

Of parties defendants, see Parties, II, B.

Of parties plaintiff, see Parties I, B.

Remedy for misjoinder, see Action, § 43.

JOINT ADVENTURES.

See Partnership.

§ 6. Rights and liabilities of parties as to third persons.

Where property is sold to a firm engaged in buying live stock, and they are all charged with having purchased the stock, a joint recovery may be had without an allegation that they were partners.

Rappell v. Rebham, 6 Ky. Opin. 311.

JOINT TENANCY.

§ 7. Mutual rights, duties, and liabilities of joint tenants.

§ 11. Rights and liabilities of joint tenant.

§ 14.—Actions by or against joint tenants.

See Tenancy by Entirety; Tenancy in Common.

Agency between joint owners of property, see Principal and Agent, § 14.

Widow and children, see Deeds, § 136.

§ 7. Mutual rights, duties and liabilities of joint tenants.

The presumption of fact, that where one joint tenant enters upon the premises his entry is for his co-tenants as well as himself, may be rebutted by evidence.

Leffler v. Mount's Heirs, 7 Ky. Opin. 689.

§ 11. Rights and liabilities of joint tenants as to third persons.

§ 14.—Actions by or against joint tenants.

The preponderance of evidence as to a purchase of lands by joint own-

ers, though the deed be taken in the name of one, was held to be sufficient to adjudge against an estate a reconveyance of one-half to the surviving brother.

Motheral v. Motheral, 2 Ky. Opin. 515.

JOURNALS.

Of city council, see Municipal Corporations, §§ 99, 109.

JUDGES.

I. APPOINTMENT, QUALIFICATION AND TENURE.

§ 3. Appointment or election.

II. SPECIAL OR SUBSTITUTE JUDGES.

§ 14. Constitutional and statutory provisions.

§ 16. Appointment, qualification, and tenure.

III. RIGHTS, POWERS, DUTIES AND LIABILITIES.

§ 24. Judicial powers and functions in general.

§ 25. Authority and proceedings of special or substitute judges.

§ 29. Exercise of powers in different courts.

§ 31. Powers after expiration of term.

§ 32. Powers of successor as to proceedings before former judge.

IV. DISQUALIFICATION TO ACT.

§ 51. Objections to judge, and proceedings thereon.

Mandating county judge to permit school commissioner to qualify, see Mandamus, § 27.

Motives of judge in rendering decision, see Trial, § 387.

I. APPOINTMENT, QUALIFICATION AND TENURE.

§ 3. Appointment or election.

The fact that one of the plaintiffs in the court below was a married woman can not destroy the presumption that the judge who decided the cause was properly chosen and sworn.

Henderson v. Adams, 6 Ky. Opin. 541.

II. SPECIAL OR SUBSTITUTE JUDGES.

§ 14. Constitutional and statutory provisions.

The constitution and the law provide for the election of a special judge and empower him to serve when from any cause the judge shall fail to attend, or being in attendance can not properly preside; and where the special judge is elected when there is a regular judge and has assumed jurisdiction over a cause, and the parties have gone into trial, before the resignation of the regular judge is tendered or accepted, the special judge has jurisdiction to complete such trial and enter a judgment, even though the regular judge has at that time resigned.

Beauchamp v. Commonwealth, 11 Ky. Opin. 655.

§ 16. Appointment, qualification and tenure.

In the absence of a showing to the contrary, the Court of Appeals will presume that the provisions of the law as to the appointment of judges pro tempore were substantially complied with.

King v. Commonwealth, 6 Ky. Opin. 398.

The objection that a special judge was not sworn cannot be set up in the Court of Appeals for the first time.

Davis' Exrs. v. Hane, 1 Ky. Opin. 487.

A consent order, selecting a pro tem. judge, while binding on the adult litigants, is not binding on the minor defendants or plaintiffs, as they could make no consent.

Bryan v. Wade, 3 Ky. Opin. 213.

Since there is no statute authorizing the appointment of a special judge of a police court, the selection of one by the parties does not invest him with judicial functions, and his findings and judgments are nothing more than an award and cannot be enforced as a judgment, and no appeal lies to the county court.

Steinberger v. Taylor, 5 Ky. Opin. 106.

III. RIGHTS, POWERS, DUTIES AND LIABILITIES.

§ 24. Judicial powers and functions in general.

Where, acting under § 800, Civil Code, the chancellor suspended a judgment rendered, within the prescribed time, having thus retained the power within a reasonable time thereafter to set aside the verdict, he did not abuse a legal discretion in subsequently doing so.

Keen v. Doorman, 2 Ky. Opin. 662.

§ 25. Authority and proceedings of special or substitute judges.

The special judge of a police court having no jurisdiction, his order appointing a commissioner is void, and the commissioner is not entitled to compensation.

Steinberger v. Taylor, 5 Ky. Opin. 106.

§ 29. Exercise of powers in different courts.

Where the official duties of the presiding judge of the county court require that he should participate actively in arranging for the erection of the public buildings of the county, appointment of necessary committees thereon, and to guard the interests of the people of the county in general, and a proper sense of propriety should therefor restrain him from becoming a contractor for the erection of these public works, where his interests would conflict with his official duties, a successful bidding for and securing such a contract by him should be allowed to stand, where there is no statutory inhibition against a county judge, and the pleadings do not show that he derived any advantage from his official position nor anything unfair in awarding the contract, and a more advantageous one could not have been made with others, and where the contract made was approved by the justices of the county court.

Cates v. Johnson, 2 Ky. Opin. 439.

§ 31. Powers after expiration of term.

A judgment entered of record after the expiration of the judge's term of office is a nullity, and the subsequent action of the legislature cannot revive

a judgment that has been abandoned or merged into another.

Smith v. Browder, 5 Ky. Opin. 701.

§ 32. Powers of successor as to proceedings before former judge.

Where the judge presiding at a trial died without disposing of a motion for a new trial, and his successor granted a new trial without any knowledge of the evidence adduced on the trial or of the rulings or instructions of the court, and a verdict and judgment were rendered on defendant on the second trial, a reasonable and fair presumption should be indulged in favor of the correctness of the finding for the jury and the action of the court in supervising the trial, and a new trial should not be claimed without knowledge or information as will enable the court to exercise a sound discretion in determining the question involved.

Mattingly v. Louisville & N. R. Co., 5 Ky. Opin. 132.

IV. DISQUALIFICATION TO ACT.

§ 51. Objections to judge, and proceedings thereon.

Under the statute of April 22, 1880, making it a punishable offense for the county judges of Carter and Elliott counties to fail or refuse to vacate the bench when a litigant objects to his sitting in a cause and files his affidavit in support of his objection, this court will not reverse a judgment sustaining a demurrer to the indictment in the absence of a showing that the affidavit contains sufficient reasons for the vacation of such seat, as is required in the law requiring circuit judges to vacate their seats and punishing them for refusing to do so.

Commonwealth v. Wammoth, 11 Ky. Opin. 227.

JUDGMENT.

I. NATURE AND ESSENTIALS IN GENERAL.

§ 5. Essentials in general.

§ 6. Authority of court or other tribunal.

§ 11.—Time of rendition.

§ 15. Jurisdiction of cause of action.

§ 16. Jurisdiction of the person and subject-matter.

§ 17. Process or notice to sustain judgment.

§ 18. Pleadings to sustain judgment.

§ 19. Evidence to sustain judgment.

§ 21. Certainty of determination.

II. BY CONFESSION.

§ 42. Confession without action in general.

§ 61. Time of entry of judgment.

III. ON CONSENT, OFFER, OR ADMISSION.

§ 71. Consent of parties.

§ 72.—Requisites and sufficiency.

§ 89. Defects and objections.

§ 90. Opening or vacating judgment.

IV. BY DEFAULT.

(A) REQUISITES AND VALIDITY.

§ 96. Parties against whom judgment by default may be rendered.

§ 97.—In general.

§ 99. Jurisdiction in general.

§ 100. Pleadings to sustain judgment.

§ 105. Default in pleading.

§ 106.—Failure to plead in general.

§ 110. Operation and effect of default.

§ 111.—In general.

§ 114. Waiver of default.

§ 115. Relief awarded on judgment by default.

§ 119. Time for taking default.

§ 126. Proof of cause of action.

§ 132. Premature entry of judgment.

(B) OPENING OR SETTING ASIDE DEFAULT.

§ 138. Right to relief in general.

§ 143. Excuses for default.

§ 145. Meritorious cause of action or defense.

§ 150. Proceedings in cause operating to open default.

§ 153. Time for application.

§ 157. Affidavits on application.

§ 160.—Affidavit of merits.

V. ON MOTION OR SUMMARY PROCEEDINGS.

§ 182. Motion or other application.

VI. ON TRIAL OF ISSUES.

(A) RENDITION, FORM AND REQUISITES IN GENERAL.

- § 199. Notwithstanding verdict.
- § 205. Amount of recovery.
- § 206. Personal judgment in proceedings by attachment or in rem.
- § 209. Time for rendition.
- § 221. Designation of amount.
- § 225.—Medium of payment.
- § 226. Designation and description of property.
- § 232. Defects and objections.

(B) PARTIES.

- § 236. Judgment against one or more coparties.
- § 248.—In general.
- § 245. Defects and objections.

(C) CONFORMITY TO PROCESS, PLEADINGS, PROOFS, AND VERDICT OR FINDINGS.

- § 246. Conformity to process.
- § 247. Conformity to pleadings and proofs.
- § 248.—In general.

VII. ENTRY, RECORD AND DOCKETING.

- § 271. Authority to enter.
- § 272. Time for entry in general.

VIII. AMENDMENT, CORRECTION, AND REVIEW IN SAME COURT.

- § 296. Authority of court, judge, or judicial officer.
- § 297.—In general.
- § 299.—After the term.
- § 302. Nature of errors or defects.
- § 304.—Judicial errors.
- § 305.—Provisions of judgment not conforming to decision or verdict.
- § 306.—Clerical errors.
- § 307.—Omissions.

IX. OPENING OR VACATING.

- § 339. Authority of court.
- § 342.—After the term.
- § 343. Right to relief in general.
- § 353. Errors and irregularities.
- § 354.—In general.
- § 362. Mistake, inadvertence, surprise, excusable neglect, casualty or misfortune.
- § 363.—In general.
- § 372. Fraud, perjury, collusion or other misconduct.
- § 384. Form and requisites of application in general.

- § 386. Time for application.
- § 398. Operation and effect.
- § 401. Restitution.

X. EQUITABLE RELIEF.

(A) NATURE OF REMEDY AND GROUNDS.

- § 414. Equitable nature of grounds for relief.
- § 417. Want of jurisdiction.
- § 428. Defenses not interposed in former action.
- § 431. Excuses for failure to interpose defenses.
- § 439. Compelling set-off or reduction of damages.
- § 446. Newly discovered evidence.

XI. COLLATERAL ATTACK.

(A) JUDGMENTS IMPEACHABLE COLLATERALLY.

- § 470. Judgments presumed valid in general.
- § 482. Judgment by default.

(B) GROUNDS.

- § 488. Want of jurisdiction.
- § 490.—Want of or defects in process, service or notice.
- § 494.—Right of third persons to impeach judgment.
- § 500. Errors and irregularities.
- § 508. Fraud, perjury, collusion, or other misconduct.

(C) PROCEEDINGS.

- § 518. Collateral nature of proceedings in general.
- § 521. Proceedings to prevent enforcement of judgment.

XII. CONSTRUCTION AND OPERATION IN GENERAL.

- § 525. Recitals.
- § 528. Judgment in personam or in rem.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(A) JUDGMENTS OPERATIVE AS BAR.

- § 540. Nature and requisites of former recovery as bar in general.
- § 549. Nature of action of other proceeding.
- § 550.—In general.
- § 562. Necessity for decision on merits.
- § 564. Finality of determination.
- § 581. Judgment vacated or reversed.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(A) JUDGMENTS CONCLUSIVE IN GENERAL.

§ 643. Nature of action or other proceeding.

§ 645.—Actions at law and suits in equity.

§ 650. Finality of determination.

§ 651. Judgment by confession or on consent or offer.

§ 663. Pendency of appeal.

(B) PERSONS CONCLUDED.

§ 665. Identity of persons in general.

§ 667. Parties of record.

§ 668.—In general.

§ 675. Persons participating in or promoting action or defense.

§ 690. Coheirs or codistributees and devisees or legatees.

§ 692. Guardian and ward.

§ 704. Plaintiffs or defendants.

§ 706. Persons not parties or privies.

(C) MATTERS CONCLUDED.

§ 713. Scope and extent of estoppel in general.

§ 714. Identity of subject-matter.

§ 716. Matters in issue.

§ 717.—In general.

§ 730. Matters in issue but not decided.

§ 731.—In general.

§ 743. Title or claim to property.

(D) JUDGMENTS IN PARTICULAR CLASSES OF ACTIONS AND PROCEEDINGS.

§ 747. Actions relating to real property.

XV. LIEN.

§ 754. Creation and existence of lien in general.

§ 755. Court or other tribunal rendering judgment.

§ 757.—Special, limited, or inferior jurisdiction.

§ 800. Release, discharge, or extinguishment of lien.

XVII. FOREIGN JUDGMENTS.

§ 813. Grounds of recognition in general.

§ 814. Judgments of state courts.

§ 822.—Conclusiveness of adjudication.

XVIII. ASSIGNMENT.

§ 844. Operation and effect of transfer in general.

XIX. SUSPENSION, ENFORCEMENT AND REVIVAL.

§ 852. Suspension or stay of proceedings.

§ 854. Proceedings to enforce judgment.

§ 855.—In general.

§ 857. Necessity for revival.

§ 860.—Death of party.

XX. PAYMENT, SATISFACTION, MERGER AND DISCHARGE.

§ 875. Mode and sufficiency of payment.

§ 883. Set-off of judgments.

XXI. ACTIONS ON JUDGMENTS.

(A) DOMESTIC JUDGMENTS.

§ 903. Judgments on which actions may be brought.

§ 904. Conditions precedent.

§ 906. Defenses.

§ 911. Parties.

§ 912. Pleading.

§ 913.—Declaration, complaint, or petition.

§ 917. Evidence.

§ 918.—Presumptions and burden of proof.

§ 922. Judgment, and enforcement thereof.

(B) FOREIGN JUDGMENTS.

§ 930. Defenses.

§ 936. Process and appearance.

§ 937. Pleading.

§ 938.—Declaration, complaint, or petition.

See Attachment, § 117; Bills and Notes, § 540; Cancellation of Instruments, § 60; Divorce, IV, F; Ejectment, §§ 113, 114, 117; Equity, X; Executors and Administrators, §§ 255, 453; Fraudulent Conveyances, § 311; Guardian and Ward, § 133; Husband and Wife, § 237; Infants, § 104; Insolvency, § 153; Justices of the Peace, § 118; Mortgages, § 483; Municipal Corporations, § 570; Partition, § 95; Replevin, §§ 99, 100; Trusts, § 265; Vendor and Purchaser, § 518; Wills, V, J.

Affirmance of judgment, see Appeal, XVII, B.

Against garnishee, see Garnishment, §§ 174, 181.

Against insane person, see Insane Persons, § 100.

Against one of two joint obligors, see Bills and Notes, § 540.

- Against railroad company, see Corporations, § 522.
- Against trustee, see Trusts, § 375.
- Amendment of decree rendered at former term of court, see Equity, § 429.
- Annulment of decree for divorce, see Divorce, § 153.
- Appealable judgment, see Appeal, § 73.
- Arrest of judgment, see Criminal Law, § 970; Larceny, § 82.
- Based on allegation of proof, see Evidence, § 99.
- By default in action for damages, see Damages, §§ 193, 198.
- Conclusiveness of judgment, see Appeal, § 223.
- Confession of judgment—Mental incompetency, see Bills and Notes, § 100.
- Directing sale of real estate by executor or administrator, see Executors and Administrators, § 345.
- Direction of judgment in lower court, see Appeal, § 1176.
- Discharging injunction, interlocutory, see Appeal, § 67.
- Effect of judgment in ejectment, see Ejectment, § 117.
- Effect on judgment of appeal to circuit court, see Appeal, § 3.
- Enjoining enforcement of judgment, see Injunction, §§ 25, 27, 110.
- Entry after expiration of judge's term of office, see Judges, § 31.
- Final judgment, see Criminal Law, § 1023.
- Final judgment rendered by Court of Appeals, see Appeal, § 1175.
- Finality of judgment, see Appeal, §§ 66, 79.
- Foreclosure of mortgage, see Mortgages, §§ 483, 485.
- For improvement assessment, see Municipal Corporations, § 570.
- For costs, see Costs, § 93.
- For partition, see Partition, § 112.
- Ground for arrest of judgment, see Criminal Law, § 967.
- Intermediate and interlocutory decisions, see Appeal, § 67.
- Of Court of Appeals equivalent to mandate, see Appeal, § 1186.
- In action by surety against principal, see Principal and Surety, § 190.
- In action on guardian's bond, see Guardian and Ward, § 182.
- In attachment proceedings, see Attachment, §§ 194, 217.
- In detinue, see Detinue, § 25.
- In suit to foreclose vendor's lien, see Vendor and Purchaser, § 285.
- Lien of judgment for alimony, see Divorce, § 256.
- Limitation of action on judgment, see Limitation of Actions, § 25.
- Merger of note into judgment, see Bills and Notes, § 540.
- Modification of decree for divorce, see Divorce, § 164.
- Motion in arrest of judgment, see Criminal Law, §§ 967, 974.
- On bail bond, see Bail, § 93.
- On conflicting evidence, see Appeal, § 1011.
- Personal judgment against discharged bankrupt, see Bankruptcy, § 435.
- Personal judgments against infants, see Infants, § 104.
- Personal judgment against married women, see Husband and Wife, § 238.
- Power of Court of Appeals to modify judgment or order, see Appeal, § 1146.
- Premature decision, see Appeal, § 1168.
- Rendition, form and entry of, see Appeal, XVII, E.
- Reversal by Court of Appeals, see Appeal, XVII, D.
- Reversal of judgment in criminal case, see Criminal Law, § 1186.
- Second personal judgment, see Execution, § 420.
- When judgment in criminal case will not be disturbed, see Criminal Law, § 1157.
- I. NATURE AND ESSENTIALS IN GENERAL.
- § 5. Essentials in general.
- A judgment for the sale of real estate must contain a description of the tracts ordered sold.
- Smith v. Hayden, 10 Ky. Opin. 549.
- The expressed opinion of the judge is not a judgment and therefore not final, and an appeal taken from such an opinion will be dismissed.
- Smith v. Wilson & Co., 11 Ky. Opin. 946.
- § 6. Authority of court or other tribunal.
- In a supplemental proceeding by a guardian to validate a judgment and

sale, the court has full power, upon proof sufficient to satisfy the court of the truth of the allegation of the supplemental petition, to render a decree confirming the original judgment and sale.

Huber v. Armstrong, 7 Ky. Opin. 256.

§ 11.—Time of rendition.

Where notice has been given and a judgment rendered by a court having jurisdiction, although the judgment may be premature, it is not void but merely erroneous.

Bryant v. Crittenden, 10 Ky. Opin. 605.

§ 15. Jurisdiction of cause of action.

A judgment rescinding a contract of assignment of a title bond without litigation between the assignor and the maker is erroneous.

Grady v. Bailey, 5 Ky. Opin. 644.

A petition in the circuit court on a judgment for \$77.78 without allegations that the defendant owns real estate in the state, subject to the debt, is erroneous, as the action could only be brought in the quarterly court.

Peeler v. White, 4 Ky. Opin. 96.

§ 16. Jurisdiction of the person and subject-matter.

A judgment is void when taken against a person not served with process who resides within the jurisdiction of the court and who does not appear to the action.

Barker v. Barker, 11 Ky. Opin. 203.

A personal judgment against infants, without the appointment of a guardian ad litem, is void, and also against non-residents.

Snapp v. Johnson, 3 Ky. Opin. 62.

The assignor of a note must be before the court before a judgment can be rendered against the assignee.

Brown v. Young's Admx., 4 Ky. Opin. 701.

§ 17. Process or notice to sustain judgment.

A judgment upon a bill or order of revivor without service of any kind is void.

Bryan v. Wade, 3 Ky. Opin. 213.

Where a petition was amended changing the action from a suit counting on a parol promise to one on promissory notes, and judgment was rendered on the same day the minute petition was filed without service of process, is erroneous.

Hester v. Graham, 3 Ky. Opin. 436.

Where after a judgment was entered on a petition to which A. was not a party, an amended petition was filed against A. only, and judgment rendered against him by default, and sale was made, the sale was void, since the original case was not in court, the husband of A. not being made a defendant.

Frain v. Luen & Steinweider, 4 Ky. Opin. 449.

It is erroneous to render judgment against a non-resident defendant, constructively summoned, until the plaintiff has executed the bond required by § 444, Civil Code.

Owens v. Bartley, 4 Ky. Opin. 265.

A judgment can not be rendered on a cross-petition until service of summons on the defendants therein either actually or constructively.

Zeigler v. Brown, 5 Ky. Opin. 716.

A judgment for the sale of real estate, where no process has been served on the holder of the fee and on those in possession, and where no defense is made by such parties, is a nullity and binds no one, and a purchaser at such a sale acquires no right whatever.

Kelly & Ballard v. Bailey, 12 Ky. Opin. 486.

§ 18. Pleadings to sustain judgment.

The court can not grant relief on proof furnished without pleadings filed as a basis for such proof.

Hooser's Admr. v. Hooser, 10 Ky. Opin. 229.

An action on a note for the payment of money and nothing else will not authorize a judgment to sell the debtor's land, or to create a lien upon it, since the judgment can only decide what is in issue as shown by the pleadings.

Walker v. Lancaster, 11 Ky. Opin. 896.

Although the evidence may authorize a judgment, the judgment can not be sustained if there is no pleading on which to base it.

Price v. Lane, 6 Ky. Opin. 133.

Where a petition prayed that defendant be compelled to surrender land that it might be sold to refund to him the amount owing to him by certain persons, and if that can not be done, he prays for a judgment for the amount paid by him to redeem the land, together with interest, "and for all general and special relief in the premises," the prayer is sufficient to authorize judgment if the facts alleged in the petition are sufficient to constitute a cause of action.

Lair v. Watts, 7 Ky. Opin. 117.

§ 19. Evidence to sustain judgment.

A holder of notes, none of which were due, when a cross-petition was filed by him, can not have judgment therefor, as only the allegations could be taken as confessed, and not its prayer.

Barbee v. January's Admr., 3 Ky. Opin. 433.

§ 21. Certainty of determination.

A judgment directing the sale of property should be so specific in its directions as to enable the commissioner to execute the mandate without reference to any other paper in the case.

Hedrick v. Peters, 7 Ky. Opin. 565.

II. BY CONFESSION.

§ 42. Confession without action in general.

Where the parties to an action consented to submission of the controversy to arbitrators without an answer by defendant, the failure to answer did not entitle plaintiffs to a judgment by confession.

Ford v. Rice, 6 Ky. Opin. 409.

§ 61. Time of entry of judgment.

An order taking the petition for confessed should not be made before the submission of the case, or before the term at which it stood for trial, and should not be made before the process was served on all defendants

concerned in interest with those against whom confession is taken.

Alexander & Lancashire v. Quigley's Exrs., 1 Ky. Opin. 230.

III. ON CONSENT, OFFER OR ADMISSION.

§ 71. Consent of parties.

§ 72.—Requisites and sufficiency.

Judgment should not be rendered against a party at the instance of his adversary by agreement, unless the party against whom the judgment is rendered is in court consenting.

Allen v. Clift, 9 Ky. Opin. 652.

§ 89. Defects and objections.

One can not object to a judgment which was rendered by his express consent.

Shelby v. Welch, 13 Ky. Opin. 1028.

§ 90. Opening or vacating judgment.

After a consent judgment has been agreed on by litigants, their attorneys can not change or annul same, since an attorney has no power to compromise his client's suit, nor to set aside a judgment in his favor.

Lawson v. Wright, 3 Ky. Opin. 352.

Where a judgment abating an action is set aside, except as to costs, by consent of the parties for the purpose of trying the issue presented by another paragraph of the complaint, the judgment for costs, which was allowed to stand, is in effect a consent judgment and to hold the demurrer to the answer sufficient would be to set aside that consent, which will not be done on behalf of one consenting thereto.

Bank of Columbia v. Bush, 11 Ky. Opin. 559.

IV. BY DEFAULT.

(A) REQUISITES AND VALIDITY.

§ 96. Parties against whom judgment by default may be rendered.

§ 97.—In general.

No default can be taken against persons named only in the body of the complaint.

Pollard's Heirs v. Morrison's Admr., 9 Ky. Opin. 43.

§ 99. Jurisdiction in general.

No valid judgment can be taken against a party not served with process and who does not appear to the action.

Kanawha & Ohio Coal Co. v. Hunt, 8 Ky. Opin. 178.

§ 100. Pleadings to sustain judgment.

The allegation, and not the prayer, in a petition should control a judgment by default.

Mansfield v. Mansfield, 2 Ky. Opin. 182.

The allegations of a petition against a defendant constructively summoned, and who failed to appear, can not be taken as true, unless the plaintiff files with his petition his own affidavit, stating that the allegations are true and known to be so by the defendant, and that they can not be proven otherwise than by his answer.

Wood v. Kinkad & Sweatman, 4 Ky. Opin. 174.

§ 105. Default in pleading.

In an action founded on bonds of defendants to perform the judgment exhibited, the amount sought to be recovered being specifically stated in accordance with the judgment, and the defendants failing to answer, the court is authorized to render a judgment without a jury to assess damages.

Perry v. McKee, 2 Ky. Opin. 663.

In a suit on a note, where no answer was put in nor allegation of payment by appellees, the appellants were entitled to a judgment by default.

Snoddy & Co. v. Allen & Belew, 1 Ky. Opin. 207.

§ 106.—Failure to plead in general.

A party who was served with process nearly six months before judgment was rendered but who failed to answer and prepare his defense, can not complain that judgment was rendered before his defense was heard.

City of Louisville v. Murphy, 6 Ky. Opin. 62.

Where the allegations of a petition authorize recovery against a city, and the answer offered by the city is not responsive to the petition, judgment

may be rendered against the city by default.

City of Paducah v. Holloran & Co., 6 Ky. Opin. 547.

The failure of a defendant to answer after he is served with process, entitles the plaintiff to a judgment, upon proof of his cause of action.

Maloney v. Smith's Admr., 11 Ky. Opin. 577.

§ 110. Operation and effect of default.
§ 111.—In general.

Before there can be any judgment against a party for failing to comply with an order, it must appear that a rule had been entered and the order made, and where the party appeals from a judgment taken against him on account of such failure because no rule was served on him or order made against him, the trial court can not after appeal supply the omission by amending its records so as to show such order to have been made, and there can be no amendment when there is nothing in existence to amend.

Martin v. Martin's Admr., 13 Ky. Opin. 17.

§ 114. Waiver of default.

One who is guilty of laches can not complain of a default judgment, though mistaken in his belief of his rights.

Smith v. Smith's Admr., 1 Ky. Opin. 411.

§ 115. Relief awarded on judgment by default.

The Code [Civ. Code (1876), Cr. 2, § 90] expressly provided that when no defense is made the plaintiff is not entitled to judgment for any relief not specifically demanded.

Blackburn v. Mann, 11 Ky. Opin. 598.

§ 119. Time for taking default.

A defendant on whom process is served has no right to assume that judgment can not be taken before the process is served on his partner and codefendant.

Smith v. Smith's Admr., 1 Ky. Opin. 411.

§ 126. Proof of cause of action.

A judgment by default on a petition to set aside a conveyance as fraudu-

lent is premature, unless the records of the suit and the conveyance be in the pleadings.

Smedley v. Sauner, 3 Ky. Opin. 330.

The allegations in a petition, alleging the sale of a horse by warranty, and that the purchaser would be compelled to return same by reason of the intervention of a claimant; that the vendor would become indebted to the vendee by failure of the warranty, will not justify a judgment by default, where without proof, the liability was not manifested.

Brotherton v. Megill, 3 Ky. Opin. 121.

Where the material allegations of the petition are denied, it is error to render judgment against the defendant in the absence of any proof.

Taylor v. Duvall, 5 Ky. Opin. 322.

§ 132. Premature entry of judgment.

Where one named as a defendant has been summoned to answer the plaintiff's petition and has also been served with a summons to answer the cross-petition, more than sixty days before the rendition of a judgment against him, he can not have such a judgment set aside on the claim that it was entered before such action stood regularly for trial.

Hardin v. Hardin, 13 Ky. Opin. 338.

(B) OPENING OR SETTING ASIDE DEFAULT.

§ 138. Right to relief in general.

Where plaintiff by agreement with defendant proposed and conditionally entered into an agreement to compromise his claim upon the execution and delivery by defendant of three notes of \$50 each, with a mortgage to secure them on the property attached; and the notes and mortgage were executed and delivered by defendant, and plaintiff did not return them during the term of court, but proceeded with the action and took judgment by default; such condition of facts will justify, upon proper motion and affidavit, the setting aside of the judgment, and

defendant be allowed to defend the action.

Sibly v. Armstrong, 1 Ky. Opin. 619.

A judgment by default will not be set aside on the ground of no service, where such return is shown, upon the mere statement of the defendant that he received no summons, and of the deputy sheriff that he had no distinct recollection concerning it.

Wilson v. Northrup, 13 Ky. Opin. 190.

Where process is duly served in a cause and steps taken by a plaintiff to enforce a contractor's lien, and no appearance is made by the defendant in the cause until long after judgment is entered and the property sold under it, such sale and the judgment will not be set aside at the instance of the defendant, in the absence of fraud in procuring the judgment or in the sale of the property.

Randall v. Redd & Bros., 13 Ky. Opin. 1026.

§ 143. Excuses for default.

Whenever by the fault of the plaintiff or other cause of surprise to the defendant, which he could not by ordinary prudence have discovered and avoided, judgment was taken, the presumption is strong that an unjust judgment has been rendered, and the court, on application made at the same term, within the exercise of a sound and just discretion, will set aside the judgment and permit defense to be made, if a sufficient defense be disclosed.

Sibly v. Armstrong, 1 Ky. Opin. 619.

§ 145. Meritorious cause of action or defense.

A plea that a defendant, who had not employed an attorney, was present at a term of court and learned that all ordinary cases would go over, and had a good defense, is insufficient to set aside a default judgment.

Taylor v. Taylor, 4 Ky. Opin. 78.

§ 150. Proceedings in cause operating to open default.

In a suit in equity to vacate a judgment rendered by default, the averments of the petition must bring the case within the revisory powers of

the court, as limited and defined by section 579 of the Civil Code Prac., and where the facts alleged do not constitute any one of the grounds prescribed by said section, a judgment which is sought to be vacated or modified thereby will not be disturbed.

Owens v. Cox, 1 Ky. Opin. 80.

Where in a suit for a devastavit, the petition neither alleges the amount of assets nor its sufficiency to pay off the debts sued for, but leaves the amount blank and refers to the appraisement and sale bills to show its sufficiency; and neither of the documents were filed as exhibits; a judgment by default against the surety, the only party served with a summons, is void.

Edmondson v. Summers, 2 Ky. Opin. 143.

By failure to answer in suit on bond, appellant admitted that she has assets in her hands sufficient to pay the debt, and judgment should be rendered against her *de propriis bonis*, to be levied of assets in her hands.

Elder v. Lucas, 2 Ky. Opin. 86.

§ 153. Time for application.

A defendant constructively summoned has a right to come in within five years and, by presenting a defense, to open any judgment entered against him.

Citizens Nat. Bank v. Dronillard, 13 Ky. Opin. 251.

Where real estate is sold under a judgment in rem against a non-resident owner, and the proceeding is irregular because the statute was not followed, the nonresident may have the judgment set aside by applying therefor within five years and presenting a valid defense to the action, and in such a proceeding the purchaser must restore the property.

Cheatham v. Ragland, 13 Ky. Opin. 961.

§ 157. Affidavits on application.

§ 160.—Affidavit of merits.

Before a defendant can set aside a judgment taken against him by default, he must show the facts which he claims constitute his defense to the action.

Willson v. Northup, 13 Ky. Opin. 190.

V. ON MOTION OR SUMMARY PROCEEDING.

§ 182. Motion or other application.

Where notice of a motion for judgment on a bond was not served on the obligors five days before the motion was made, the error was waived by the appearance thereto, and consenting to the trial without objection.

Millett v. Millett, 3 Ky. Opin. 431.

VI. ON TRIAL OF ISSUES.

(A) RENDITION, FORM AND REQUISITES IN GENERAL.

§ 199. Notwithstanding verdict.

Before a judgment can be rendered on an answer it must be made a cross-petition.

Marquis v. McMannama, 1 Ky. Opin. 203.

Where the answer presents no defense to a petition, and the plaintiff proves his cause of action, he is entitled to a judgment notwithstanding the verdict is against him.

Bellew v. Angling, 9 Ky. Opin. 349.

A judgment can not be lawfully demanded, notwithstanding the verdict, where the pleadings present an issue upon the merits and the testimony is conflicting.

Farmers' Nat. Bank of Mt. Sterling v. Wilkerson & Jones, 10 Ky. Opin. 810.

§ 205. Amount of recovery.

A judgment can not be rendered for more than the amount called for by the pleadings.

Lair v. Reynolds, 7 Ky. Opin. 686.

Where, in a suit to recover the value of property and for damages, the jury find that such value and damages amount to \$625 and the plaintiff's petition only asks for \$600, the court may enter judgment for \$600 only.

Fowler v. Gordon, 11 Ky. Opin. 475.

§ 206. Personal judgment in proceedings by attachment or in rem.

Where a claim is sued upon and it is sought to enforce a lien, and the debt was not the debt of the defendant originally, nor one that he subse-

quently assumed, there can be no personal judgment.

Vincent v. Duff, 10 Ky. Opin. 560.

§ 209. Time for rendition.

Where a matter at issue is submitted to a jury, no judgment of the court can be entered until the jury has made a finding.

Stephens v. Norton, 11 Ky. Opin. 474.

§ 221. Designation of amount.

§ 225.—Medium of payment.

A judgment is invalid when it provides that plaintiff shall recover principal and interest "in gold coin or its equivalent in legal tender notes," but fails to determine what constitutes such notes.

Burbanks' Admr. v. Burbanks' Admr., 8 Ky. Opin. 113.

§ 226. Designation and description of property.

Where a petition and a judgment describing land as the land on "Yellow Bank Island," the description is too indefinite and uncertain to enable the commissioner to execute a judgment without danger of injustice to the owners and probable sacrifice of their rights.

Watkins v. Summers & Co., 6 Ky. Opin. 341.

Land sought to be subjected to sale to satisfy a debt must be described in the petition so that the commissioner to make sale can identify the land from an examination of the petition and papers in the suit; and a judgment for plaintiff on such a defective petition will be reversed.

Mills v. Early, 8 Ky. Opin. 110.

A judgment for the sale of land should set forth an accurate description of the land to be sold so that it may be identified by reference to the judgment.

Mark v. Little, 8 Ky. Opin. 187.

A judgment ordering the sale of real estate must contain such a description of the land as will enable the commissioner and purchasers to find it without reference to papers and exhibits on file in the case.

Green v. Whalley, 8 Ky. Opin. 240.

A judgment for the sale of land will be reversed where it does not in itself contain such a description of the land as will enable the master to find it without reference to the title papers.

Vaugh v. Neeley, 8 Ky. Opin. 390.

A judgment ordering the sale of real estate, which in itself fails to describe the particular real estate, is erroneous and will be reversed.

Fox v. Tipton, 8 Ky. Opin. 413.

A judgment directing the sale of real estate is erroneous when it fails to describe the land to be sold.

Wilson v. Jones, 9 Ky. Opin. 553.

A judgment ordering the sale of real estate is erroneous which fails to describe the real estate.

Lipscomb v. Central Bldg. Assn. of Covington, 9 Ky. Opin. 432.

A judgment for the sale of land should describe the land so that it may be identified without reference to loose papers in the record; however, such a judgment is not void, and a sale under it can not be attacked otherwise than by an appeal.

Miller v. Marshall, 9 Ky. Opin. 593.

A judgment ordering the sale of land should be set aside when it contains no such description of the land that the land can be identified.

Bottom v. Bonta's Exr., 9 Ky. Opin. 619.

A judgment ordering the sale of real estate must so describe the land as to enable the commissioner to discharge his duties without reference to any other papers in the cause, and when it fails to do so the judgment will be reversed on appeal.

Smith v. Eubank's Admr., 9 Ky. Opin. 656.

§ 232. Defects and objections.

Where, after a decree rendered confirming a sale of lands, the husband, having a life estate by the curtesy entered his appearance and filed an answer approving the sale, the defect of title is cured, and an appeal therefrom should be dismissed.

Lang v. Phillips, 3 Ky. Opin. 354.

A judgment for the sale of real estate will be reversed where it fails to direct the manner of the advertisement of the sale.

Arnold v. Smith, 8 Ky. Opin. 494.

(B) PARTIES.

§ 236. Judgment against one or more coparties.

§ 237.—In general.

A judgment against three parties, where the record only shows that two of them have any interest in the controversy, is erroneous.

Fowler, Lee & Co. v. Gano, 6 Ky. Opin. 319.

Under the new rule established by § 39, Civil Code, a judgment may be rendered against the party or parties sued, though other parties jointly bound are omitted from the action.

Hughes v. Gray, 1 Ky. Opin. 1.

§ 245. Defects and objections.

Judgments rendered upon the prayer and by the procurement of feme covert and infants, are generally as binding as those rendered on the prayer of persons laboring under no disability.

Beeman v. Rouse, 3 Ky. Opin. 113.

(C) CONFORMITY TO PROCESS, PLEADINGS, PROOFS, AND VERDICT OR FINDINGS.

§ 246. Conformity to process.

Judgment on a cross-petition is improper, where taken at the same term the cross-petition was filed, plaintiff not having been served with process and not having entered formal appearance thereto.

Jones v. Gillen, 6 Ky. Opin. 96.

§ 247. Conformity to pleadings and proofs.

§ 248.—In general.

Where, in a cross-petition, certain items in dealings between the principal litigants are surcharged, a judgment without answer thereto is erroneous.

Ross v. Brannin, Summers & Co., 3 Ky. Opin. 528.

A judgment can only be rendered in accordance with the allegations of a

petition, which must control the prayer.

Roach v. Scott, 3 Ky. Opin. 90.

A judgment for an amount in excess of that claimed in the petition will be reduced to its proper sum.

Engleman v. Central Nat. Bank of Danville, 3 Ky. Opin. 132.

A plaintiff, who fails to controvert the allegations in an answer, setting up by counterclaim that a portion of the land in controversy, and which had been sold him, had been otherwise disposed of before sale to him, can not complain of a reduction of his judgment to the extent of the value of the deficiency.

Chamy v. Flamer's Admr., 3 Ky. Opin. 242.

A judgment allowing interest on debts for a longer time than the contracts sued on authorized is erroneous.

Wallingford v. Bassett's Admr., 4 Ky. Opin. 578.

Where it is alleged in a petition that the debt was created for lumber used in building a house on the land of the wife, and although it is alleged that she has a separate estate, it is not alleged that the house was built on land held by her as her separate estate, nor is it alleged whether the separate estate is real or personal, or where it is located; such allegations are too vague and uncertain to support a default judgment.

Bush v. Young & Faulkner, 4 Ky. Opin. 276.

A judgment subjecting the real estate described in the petition was not authorized by the pleadings as there is no allegation in the petition that the appellant had any lien on the property, since as between the vendor and vendee no lien exists unless retained in the deed.

Barker v. Compton, 5 Ky. Opin. 70.

No judgment can be legally rendered for interest at ten per cent., where there is no averment that defendant agreed in writing to pay ten per cent. interest on the debt.

Taylor v. Guteman, 9 Ky. Opin. 184.

VII. ENTRY, RECORD, AND DOCKETING.

§ 271. Authority to enter.

Persons in court assigning no valid reason why judgment should not be entered are not prejudiced by entering the judgment, since the object of notice is to enable the party to show cause why the judgment should not be entered, but if the party is present in court, and suggests no ground against judgment being entered, the reason for notice ceases.

Hayden v. Crutchfield's Exr., 11 Ky. Opin. 214.

§ 272. Time for entry in general.

The Court of Appeals is not disposed to disregard a judgment filed in vacation, which finds its way into the order book afterwards and is made the judgment by being spread upon the record in connection with the ones made at the regular term, since it thereby became a part of the record.

Mercer's Exr. v. Caldwell, 7 Ky. Opin. 58.

Where judgment is pronounced in a cause during a regular term of the court and the record shows: "By agreement this action is resubmitted and the chancellor may file his judgment and the parties their bills of exceptions in vacation, all to have the same effect as if filed in regular term," such judgment is valid.

Cooper v. Whitehurst, 13 Ky. Opin. 406.

VIII. AMENDMENT, CORRECTION, AND REVIEW IN SAME COURT.

§ 296. Authority of court, judge or judicial officer.

§ 297.—In general.

Where a cause with the judgment and sale under it and the confirmation of the sale have been filed away with leave to redocket, the court has no longer any power over the judgment, and the only means of annulling or modifying it after the expiration of the term at which it was rendered, is by appeal or petition in the nature of a bill of review.

Gunnell v. Green, 7 Ky. Opin. 363.

The suit having been dismissed as to a portion of the land at a previous term of the court, such judgment is final and the court at a subsequent term has no power over it.

Jones v. Hopper, 5 Ky. Opin. 379.

When specific performance is demanded requiring defendant to convey to plaintiff certain real estate, and the court renders judgment requiring such conveyance and appointing a commissioner to make the same, such judgment is final and the court has no jurisdiction thereafter to change such judgment; but the court retains jurisdiction thereafter in the cause only for the purpose of executing the judgment.

Greer v. Gard, 8 Ky. Opin. 313.

Where the persons liable to taxation were ascertained by the judgment of the court, and the court adjourned, it lost all power to further revise or correct the judgment.

Boone County Court v. Snyder, 9 Ky. Opin. 918.

§ 299.—After the term.

Where the court errs in fixing the time from which interest shall be computed, the error cannot be corrected at a subsequent term of court.

Woodson v. Ballinger, 7 Ky. Opin. 101.

The Louisville Chancery Court has such control over its judgments for sixty days after their rendition as circuit courts have over their judgments during the term at which they are rendered.

Randall v. Redd & Bros., 13 Ky. Opin. 1026.

§ 302. Nature of errors or defects.

If the original petition did not authorize the direction in the judgment that it should be levied of trust estate in the hands of the defendant, the amendment filed after the judgment was rendered could not cure the defect.

McElwain v. Wright, 5 Ky. Opin. 450.

§ 304.—Judicial errors.

The rendition of judgment on an amended petition in less than twenty days after the service of process is

erroneous, but can only be corrected by motion in the court below.

Deaner v. Storme, 8 Ky. Opin. 56.

§ 305.—Provisions of judgment not conforming to decision or verdict.

Section 579, Civil Code, which authorizes the court at a subsequent term to correct its misprision, applies to judgments or final orders.

Crane v. Cox, 2 Ky. Opin. 465.

§ 306.—Clerical errors.

A clerical misprision is the erroneous entering or recording of a judgment rendered by a court, and may be corrected by motion.

Covington v. Scott, 8 Ky. Opin. 138.

An error of the clerk in entering a judgment may be corrected by the court at a subsequent term when there is anything in the record to go by, but when there is nothing in the record to amend by, such judgment can not be corrected upon the mere recollection of witnesses as to what took place in the court.

Field v. Smith, 8 Ky. Opin. 821.

When the clerk of the court, by oversight or inadvertence, has mistaken the true amount of an uncontradicted exhibit filed in a suit, it will be regarded as a misprision and corrected on motion.

American Life Ins. Co. v. Cincinnati Wire Co., 9 Ky. Opin. 640.

§ 307.—Omissions.

If, in entering up a judgment, one of the creditors was not mentioned, it was merely a clerical misprision and might be corrected on motion in the court below.

Brown v. Hilluson, 9 Ky. Opin. 581.

IX. OPENING OR VACATING.

§ 339. Authority of court.

Where no appeal was prosecuted from a judgment, it was not within the power of circuit court, at a subsequent term, to set it aside, nor to refuse to permit it to be enforced according to its spirit.

Flournoy v. Morris, 5 Ky. Opin. 47.

§ 342.—After the term.

The action of the court in setting aside a judgment at a subsequent term is void, and all proceedings taken in the case thereafter are invalid.

Brown v. Henry, 7 Ky. Opin. 162.

Where the court rendered a final judgment at the August term, 1877, it had no power at the January term, 1878, to set it aside, and an order then made purporting to set it aside is void.

Phillips v. Phillips & Bro., 11 Ky. Opin. 23.

§ 343. Right to relief in general.

A judgment confirming a commissioner's sale, like other judgments, may be modified, set aside, or vacated for sufficient reasons upon proper proceedings, but in the absence of fraud or misrepresentation upon the part of the beneficiary owner of the bonds, defendant can not escape paying them in full, unless he obtains a retrial of the motion to confirm the sale and successfully resists its confirmation.

Hill v. Hathaway & Hall, 7 Ky. Opin. 176.

A final judgment cannot be set aside at a subsequent term of court, unless for some of the grounds prescribed in the code.

Adams v. Perkins, 4 Ky. Opin. 647.

Unless one or more of the grounds embraced in §§ 579-583, Civil Code Practice, are set forth in the petition to vacate the judgment, the court has no jurisdiction of the case.

Whitesides v. Brien's Exr., 5 Ky. Opin. 11.

Where defendants in an original petition did not consent that the sale under the judgment should be set aside, their failure to answer the amended petition did not constitute such consent.

Gunnell v. Green, 7 Ky. Opin. 363.

Where there is nothing in the record showing the grounds relied upon in the motion to set aside a judgment, it will be presumed that it was not such as would deprive a court of equity of the power to vacate when

the facts alleged give the court jurisdiction.

Emison v. Carter, 7 Ky. Opin. 487.

§ 353. Errors and irregularities.

§ 354.—In general.

A judgment correctly entered, but which is erroneous, can not be corrected by motion, but must be appealed from.

Covington v. Scott, 8 Ky. Opin. 138.

§ 362. Mistake, inadvertence, surprise, excusable neglect, casualty, or misfortune.

§ 363.—In general.

Where it is made clear that a mistake is made in taking a judgment, and plaintiff recovers only a part of the debt, he may recover the remainder of the debt, but in such a case the proof must be clear and satisfactory.

Stewart v. Tussey's Admx., 12 Ky. Opin. 365.

§ 372. Fraud, perjury, collusion, or other misconduct.

A mere motion to set aside a judgment, with leave to make defense, will not preclude a party from afterwards filing a petition in equity to revoke the judgment upon the ground of fraud in obtaining it.

Emison v. Carter, 7 Ky. Opin. 487.

Where a plaintiff seeks by suit to vacate a judgment because procured without process served on him, he must allege fraud upon the part of the judgment plaintiff in procuring the return or mistake on the part of the sheriff in making it, and evidence of these facts is not admissible in the absence of such allegations.

Everett v. Ragan, 10 Ky. Opin. 898.

A judgment may be vacated for fraud practiced by the successful party in obtaining it, or for a clerical misprision, and it is not required that a party entitled to such relief should file his petition therefor not later than the second term after the discovery.

Lawless v. Sevier, 12 Ky. Opin. 231.

An allegation of fraud in general terms is not sufficient, but the particulars of which the fraud consists, and the manner in which a judgment was fraudulently obtained, must be specified in the petition to make it good as against demurrer.

McCarty v. Payne, 12 Ky. Opin. 248.

§ 384. Form and requisites of application in general.

A petition by a defendant to vacate a judgment is insufficient when it fails to allege any facts showing diligence in discovering the defenses he had before judgment, and accordingly a defendant can not have a judgment against him vacated because he forgot or by mistake failed to consider them in the agreement to enter judgment.

Beatty v. Curtis, 11 Ky. Opin. 768.

§ 386. Time for application.

A court does not have the power to vacate a judgment or final order after the term at which it is rendered, except for the causes and in the manner provided by § 579 of the Civil Code.

Brashear's Admr. v. Elijah Combs' Admr., 7 Ky. Opin. 627.

A judgment taken against a non-resident defendant on constructive notice may be set aside within five years, and such a defendant may move to have the action retried as if there had been no judgment; and where he dies during such period his heirs may file such a motion.

Lingenfelter v. Carlisle's Admr., 12 Ky. Opin. 83.

§ 398. Operation and effect.

Where an order purporting to set aside the first judgment, no sale of the land having been made by the first judgment, and the whole of the land was to be sold to pay the debts without regard to the claim of the widow for dower, and it is not proved that the land brought less when sold than it would have brought if it had been sold under the first judgment, the order setting aside the first judgment may be treated as a nullity, and it may be regarded as in full of the same land for the payment of the

same debts is not necessarily erroneous.

Adams v. Perkins, 4 Ky. Opin. 647.

§ 401. Restitution.

The proceedings by rule or motion for restitution of money or property obtained under the direct operation of a judgment which has been reversed is well known to the courts of law, and is equally allowable in courts of equity.

Doty v. Bence's Heirs, 5 Ky. Opin. 634.

The chancellor has the power to remedy the injustice which may have been done under his own orders when vacated by an appellate tribunal, and an order for restitution cannot be resisted on the grounds of any equity disposed of by the dismissal of the bill.

Doty v. Bence's Heirs, 5 Ky. Opin. 634.

X. EQUITABLE RELIEF.

(A) NATURE OF REMEDY AND GROUNDS.

§ 414. Equitable nature of grounds for relief.

Where one fails to defend when sued upon a note, he can not enjoin the collection of the judgment, for a defense that existed and of the existence of which he had knowledge before the judgment was rendered.

Roberts v. Curle, 8 Ky. Opin. 123.

§ 417. Want of jurisdiction.

Where it is sought to invalidate a judgment taken in a foreign state, the petition, to be good against demurrer, must aver facts showing that the court rendering such judgment had no jurisdiction, and the pleading of mere conclusions is not sufficient.

Bowles v. Watkins, 8 Ky. Opin. 207.

§ 428. Defenses not interposed in former action.

A proceeding in equity cannot be maintained to annul a judgment in an ordinary action, for a defense not discovered since the rendering of the

judgment, but of which the plaintiff was fully aware.

Hausman v. Lyles, 4 Ky. Opin. 145.

§ 431. Excuses for failure to interpose defenses.

One guilty of laches in a defense, depending on a third party to look after his interest, cannot complain of a judgment against him.

Andel v. Rooden, 4 Ky. Opin. 607.

§ 439. Compelling set-off or reduction of damages.

Judgments for the recovery of money may be set off against each other, but the circuit court has no jurisdiction to enjoin the collection of judgments rendered by a justice of the peace; and, independently of the provisions of the code (Civil Code, § 470), courts of chancery have jurisdiction to set off one judgment against another when injustice and wrong are about to result to one of the parties on account of the insolvency or nonresidence of the other.

Richardson v. Richardson, 8 Ky. Opin. 203.

§ 446. Newly discovered evidence.

Under § 14, Civil Code, relating to annulment of a judgment in ordinary by an equitable proceeding, a party is not entitled to a retrial because of the discovery of evidence tending to establish a fact of which he must have been cognizant for a long time prior to the rendering of the judgment sought to be annulled.

French v. French, 6 Ky. Opin. 739.

XI. COLLATERAL ATTACK.

(A) JUDGMENTS IMPEACHABLE COLLATERALLY.

§ 470. Judgments presumed valid in general.

A judgment, properly rendered, is not subject to a collateral attack, and relief from same can only be granted on the grounds as provided in §§ 37 and 579, Civil Code.

Sandefer v. Lynn, 4 Ky. Opin. 513.

§ 482. Judgment by default.

Where one suffers a judgment to be taken against him without making any defense, he can not defeat an ac-

tion brought to enforce the satisfaction of the judgment by interposing a defense.

Griffith v. Adams, 13 Ky. Opin. 751.

(B) GROUNDS.

§ 488. Want of jurisdiction.

§ 490.—Want of or defects in process, service or notice.

In an action in Kentucky on judgments rendered in Pennsylvania, the court will not hold a judgment invalid because of a sheriff's failure to state how he executed the summons.

Duboy & Bros. v. Roberts, 6 Ky. Opin. 579.

A judgment taken without notice served or an appearance by a defendant is void.

Albert v. Harris, 8 Ky. Opin. 619.

A judgment entered without the service of process, where there is no appearance by the defendant to the action is void.

Gill v. Farmer, 8 Ky. Opin. 770.

No valid judgment can be entered against one not before the court as a result of process served, or voluntary appearance.

Graham v. Sheets, 9 Ky. Opin. 701.

§ 494.—Right of third persons to impeach judgment.

In a suit against a church, members who are not included in the suit can not attack the judgment.

Brewer v. Peters, Exr., 6 Ky. Opin. 60.

§ 500. Errors and irregularities.

An erroneous judgment which has never been reversed and which has been recognized for nearly twenty years will be upheld.

Carpenter v. Strain, 4 Ky. Opin. 215.

Before the legal presumption of judicial correctness of a judgment of court can be overcome, it must be shown affirmatively by the weight of the evidence, that the decision is erroneous.

Smith v. Farrow's Admr., 3 Ky. Opin. 664.

Memorandum made by two attorneys, showing incorrectness, against the examination of same accounts by three other attorneys, showing same to be correct, is not sufficient to offset the legal presumption of the correctness of a chancery decision.

Smith v. Farrow's Admr., 3 Ky. Opin. 664.

A judgment against a defendant, who did not resist the action can not be reversed for alleged mistakes, in a separate action, and resulting from the plaintiff's own lack of diligence.

Moore v. Davis, 4 Ky. Opin. 39.

A judgment which is merely erroneous can not be attacked collaterally, since in such case the defendant's relief must be obtained, if at all, by appeal.

Turpin v. Smith, 13 Ky. Opin. 756.

§ 508. Fraud, perjury, collusion, or other misconduct.

Though fraud and collusion alleged in a petition be admitted as true, a defendant cannot attack collaterally a judgment rendered twenty-six years before, especially as she did not avail herself of the provisions of Civil Code, §§ 421, 579, subsec. 8.

Francis v. Woods, 4 Ky. Opin. 483.

A judgment cannot be collaterally attacked for fraud, but can only be annulled by a direct proceeding, affording as high grade of evidence as that upon which it is based.

Sears v. Bryant, 5 Ky. Opin. 737.

Fraud, to vitiate a judgment, must relate to the manner in which it was obtained, and not to the foundation upon which it rests.

White v. Hayden's Admr., 8 Ky. Opin. 498.

(C) PROCEEDINGS.

§ 518. Collateral nature of proceeding in general.

A defendant cannot by answer, after a judgment has been rendered on a note, plead set-off and payments on a note, the judgment not thus being subject to a collateral attack.

Geoghegan v. Miller's Admr., 4 Ky. Opin. 484.

§ 521. Proceedings to prevent enforcement of judgment.

Where, in a cause, process was served and a judgment rendered, a motion to set such judgment aside, made nearly three years after its entry, will be denied; since if relief is sought against such a judgment it must be by a new action.

Johnson v. Rodes, 8 Ky. Opin. 846.

XII. CONSTRUCTION AND OPERATION IN GENERAL.

§ 525. Recitals.

The objection to the form of the judgment because the land is adjudged to the city cannot be available, because whenever the city shall cease to use the ground as a street, it would revert to the original owner by operation of law.

Kice v. Louisville, 3 Ky. Opin. 428.

§ 528. Judgment in personam or in rem.

A judgment simply that plaintiffs are entitled to recover is not a judgment in personam.

Zeigler v. Means, 8 Ky. Opin. 221.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(A) JUDGMENTS OPERATIVE AS BAR.

§ 540. Nature and requisites of former recovery as bar in general.

A former judgment was held a bar to the relief sought, and injunction properly dissolved.

Daven's Exr. v. Ash, 4 Ky. Opin. 576.

A judgment on a claimant's bond is not a bar to a motion on a forthcoming bond.

Sparks v. Shropshire, 3 Ky. Opin. 390.

A demurrer sustained to a petition because it presents no cause of action does not bar another action, but when the defendant pleads and puts in issue the right of recovery, and the cause is submitted on the petition and answer, and a judgment is rendered

dismissing the petition, such a judgment will bar any further action on the same cause, whether proof is introduced or not.

Timberlake v. City of Newport, 10 Ky. Opin. 623.

§ 549. Nature of action or other proceeding.

§ 550.—In general.

An action for breach of covenants that a vessel is free of liens and incumbrance, settles nothing where compromised, and which did not result in a judgment.

Porter's Admr. v. Castleman, 8 Ky. Opin. 19.

§ 562. Necessity for decision on merits.

Where the records of a former suit shows that the action was dismissed for want of service, it cannot be pleaded in bar to a subsequent action in another jurisdiction.

Thomas v. Gentry, 3 Ky. Opin. 572.

§ 564. Finality of determination.

A judgment rendered by a trial court in pursuance to a mandate of the Court of Appeals, stands in a trial court as all other final judgments over which the court has no control after the expiration of the term at which it was rendered, unless to vacate or modify it in the manner prescribed by law.

Wipp v. Scott, 7 Ky. Opin. 534.

Judgments are binding between the parties and their privies until reversed, vacated, annulled, and modified in the manner prescribed by law, and will be upheld as against collateral attack.

Wipp v. Scott, 7 Ky. Opin. 534.

An interlocutory judgment may be entirely disregarded by the court when the final judgment is rendered.

Lester v. Winfrey, 5 Ky. Opin. 612.

A judgment can not be final merely because it decides some question of law or fact relating even to final relief, nor merely because it decides what are the rights of the parties as to such relief.

Lester v. Winfrey, 5 Ky. Opin. 612.

A final judgment can not be treated as a clerical misprision simply because it is erroneous.

Brown v. Henry, 7 Ky. Opin. 162.

A judgment by a court of competent jurisdiction is not only final as to all matters determined by it, but is also final as to every other matter incident to the cause which the parties might have put in issue.

Wetherly v. Crooks, 9 Ky. Opin. 192.

In case the trial court considers a set-off well pleaded, or considers it not well pleaded and did not decide against the party pleading it on the ground that his pleading was bad, the plea of former adjudication is properly sustained.

Turley v. Couchman's Admr., 9 Ky. Opin. 351.

Where in a suit in equity, the chancellor orders one of the parties to pay into court certain money for the use of the other party, and the judgment and order is affirmed in the Court of Appeals, the matter is finally adjudicated and it is too late for such defaulting party to further question the authority of the court to compel such payment.

Bate v. Bate, 9 Ky. Opin. 383.

Where the state procured a judgment for \$1,397.32, and execution issued thereon was withdrawn by order of the commonwealth's attorney, who entered into a contract some time thereafter with the defendant to submit the question of the amount owed by the defendant to arbitration, which was done and report made that the debt was \$426.03, and the court pronounced judgment for such amount, and such judgment was paid, such later judgment was void, and the commonwealth's attorney had no authority to agree to submit to arbitration what had been determined by a valid judgment unappealed from.

Commonwealth v. Humston, 9 Ky. Opin. 525.

§ 581. Judgment vacated or reversed.

Where a judgment has been affirmed on appeal to the Court of Appeals, a petition will not be entertained for correction of the judgment, in the

absence of such fraud as will authorize relief.

Davis v. Powell, 6 Ky. Opin. 567.

After the reversal of a judgment, it becomes a mere nullity, and the failure of the court to set it aside gives it no validity.

Commonwealth v. Shankes, 6 Ky. Opin. 79.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(A) JUDGMENTS CONCLUSIVE IN GENERAL.

§ 643. Nature of action or other proceeding.

§ 645.—Actions at law and suits in equity.

When the owner of a judgment caused an execution to issue and be served, and the execution debtor interposes by an injunction to prevent the sale, and then undertook to satisfy so much of the judgment as was enjoined, and the injunction was dissolved, he thereby creates his liability and is bound to pay such judgment.

Carder v. Murray, 9 Ky. Opin. 634.

§ 650. Finality of determination.

If a final judgment be rendered at the same term upon a confession, on motion the court should set it aside, and a refusal to do so is reversible error; but not erroneous on a nonorder of confession when the final judgment was not rendered until the succeeding term, and when no defense was presented.

Crane v. Cox, 2 Ky. Opin. 465.

A motion for a new trial suspends the judgment and a judgment not being in force as an absolute judgment before it was destroyed by fire, it ought not to be so entered as to make it absolute.

Green v. Stevens, 1 Ky. Opin. 36.

Attorney must be appointed for non-resident constructively summoned, sixty days before judgment can be rendered against him.

Beazley v. Marat, 1 Ky. Opin. 337.

Where the regular term of the Marion Circuit Court commenced on the fourth Monday in February, 1866, and

the appellant was served with process on the third day of such month, and by an act of the legislature the term was changed to begin on the third Monday instead of the fourth, and the court began in conformity to said act, and the appellant having failed to make defense, judgment was rendered against him for the amount of the claim, it was held that the act was not intended to deprive parties of any pre-existing rights, and the appellant not having been summoned twenty days before the third Monday in February, the judgment was rendered before the cause stood for trial, and was, according to section 578, Civil Code, a clerical misprision.

McAtee v. Hagan, 1 Ky. Opin. 69.

A judgment is presumed to be right and is binding until reversed, and before it can be assailed collaterally it must be shown to be a nullity.

None v. Letcher, 1 Ky. Opin. 450.

A judgment is final and conclusive until reversed on appeal.

Stone v. Lasley, 1 Ky. Opin. 374.

It may be presumed that a judgment was rendered on the last day of the term, where there is nothing to the contrary, the burden being on the appellant to show that the term fixed by law was extended.

Nuttall v. Roberts, 2 Ky. Opin. 153.

A judgment against a vendor is binding on him and his vendee until reversed.

Southard v. Page, 2 Ky. Opin. 401.

It is error to render judgment against a defendant on a cross-petition, during the same term it was filed, without citation or appearance, a waiver of it not appearing in the record.

Murphy & Hayden v. English & Murphy, 2 Ky. Opin. 663.

A judgment obtained can not be ignored in a collateral proceeding by those who were parties to the action in which it was rendered, and who petitioned for the relief granted.

Lawson v. Johnson, 7 Ky. Opin. 193.

Where one, in a suit sought to have the terms of a will construed, and to have his rights thereunder determined, secures a judgment in such action, he can not thereafter, in another suit, set up and have determined a claim to a part of such estate and have the will construed over again, since the first action bars the second.

Quigley v. Quigley's Exrs., 10 Ky. Opin. 658.

§ 651. Judgment by confession or on consent or offer.

Where a judgment is entered by agreement, it binds the parties to it and as to claims existing between them which the defendant did not plead when he could have done so, the claims being expressly included in the agreed judgment, such a judgment is an adjudication of all matters which were or might have been pleaded as a defense to such action.

Beatty v. Curtis, 11 Ky. Opin. 768.

§ 663. Pendency of appeal.

Where a judgment has been appealed from, it can not be relied upon as a defense to another action, for a judgment appealed from and superseded is not final and settles nothing.

Hayden v. Ortkiss' Admr., 13 Ky. Opin. 784.

(B) PERSONS CONCLUDED.

§ 665. Identity of persons in general.

Where the legal owner of real estate is not a party to a proceeding to sell the real estate, a judgment of sale is a nullity, and is no bar to a subsequent proceeding where the owner is made a party.

Knock v. Triber, 11 Ky. Opin. 203.

§ 667. Parties of record.

§ 668.—In general.

A judgment not void is binding upon all parties to it and those claiming under or through them, unless set aside or appealed from.

Boone County Court v. Snyder, 9 Ky. Opin. 918.

Before a judgment can be rendered against a nonresident, constructively summoned, the plaintiff must execute

to him a bond, as provided in section 444, Civil Code.

Thompson v. Warhurton's Exrs., 1 Ky. Opin. 488.

It is error to render a judgment against a nonresident before bond is executed, as required by subdivision 2, section 440, Civil Code.

Curb & Frazier v. Brent & Co., 1 Ky. Opin. 454.

Where suit is maintained to recover land between two claimants, and a third person is in possession of the land not claiming to hold under either of the parties, he is not bound by a judgment entered in such cause.

Arthur v. Harlan, 11 Ky. Opin. 788.

Where the court has jurisdiction of the parties and the subject-matter, a judgment entered is conclusive on all the parties; and such parties can not question the correctness of the judgment.

Brown v. Hillson, 9 Ky. Opin. 581.

Only those persons who are parties to an action in which judgment is entered are bound by the judgment.

Grant v. Graham, 9 Ky. Opin. 638.

Where the city of Louisville brought an action to enforce its lien for taxes on real estate, procured a judgment, under which the real estate was sold to satisfy the same, and purchased the property at such sale, and the sale was confirmed and the city put into possession; and afterwards, in a suit against the former owners, it had their judgment corrected so as to describe correctly the real estate sold in the former action, and had a judgment quieting its title and its right to possession, which it had held since procuring its first judgment; and no appeal was taken from either of such judgments, the former owners can not maintain an action to recover such real estate, as the former judgments unappealed from constitute a final adjudication as between such parties and those holding under or through them, and the plea of *res adjudicata* made by the defendant, the city of Louisville, is good.

Neal v. City of Louisville, 11 Ky. Opin. 466.

A judgment, not having been vacated or reversed, binds the parties to it, and is conclusive of their rights which were put in issue in the action which resulted in such judgment.

Isenberg v. Strasser, 11 Ky. Opin. 501.

One who has purchased land and is in the actual possession of it is not bound by a judgment against others to subject such land to sale to pay a debt claimed to be due, since the owner of the land in such a case, to be bound by such a judgment, must have been made a party to the suit.

Kelly v. Broadus, 13 Ky. Opin. 239.

§ 675. Persons participating in or promoting action or defense.

A judgment rendered in a suit, in which the intestate was a party thereto, is erroneous, when the representatives of the deceased are not brought before the court.

McGill v. Nelson, 2 Ky. Opin. 344.

In an action against two defendants, where one of them resided within the county, and upon whom personal service is had, the return upon the other summons being "not found," a judgment that the plaintiff "recover" of the defendant, etc., applies to the defendant upon whom the summons was served, and not to both defendants.

Bandy v. Roberts' Admrs., 2 Ky. Opin. 568.

§ 690. Coheirs or codistributees and codevisees or colegatees.

Where the plaintiff, a creditor, buys in his debtor's real estate, but receives no deed and thereafter directs the commissioner to convey to the widow of such debtor such real estate, she having paid off the debt, and such deed is made, such widow's title becomes absolute, and the fact that the clerk has before that time erroneously entered an order that such conveyance should be made to such widow for life, and remainder to her children, who were not parties to the proceeding, and who have paid no part of such debt, will not be effectual to give such children any interest in such title.

Wheatley v. Hays' Heirs, 13 Ky. Opin. 218.

§ 692. Guardian and ward.

A judgment rendered against minors, in a suit by an administrator to settle the estate of an intestate, is voidable only, and not void, by reason of the failure of the infants to answer by guardian ad litem, and if prejudicial to them, they may reverse it, but is valid and binding until reversed.

Whitmer & Bidwell v. Nall's Exr.,
2 Ky. Opin. 361.

§ 704. Coplaintiffs or codefendants.

The voluntary appearance of one of the parties not served with summons, and who is not interested in the company whose rights are to be affected by the judgment sought, although giving the court jurisdiction, will not authorize a judgment at that term of court, without consent, so as to prejudice the rights of those who had been summoned out of the county in which the action was brought.

Licking River Lumber, etc., Co. v. Cox, 7 Ky. Opin. 519.

§ 706. Persons not parties or privies.

A judgment against one person cannot be enforced against another who is neither party nor privy to it, and who is not represented either as to his person or property by a party to the action.

Alexander & Lancashire v. Quigley's Exrs., 1 Ky. Opin. 230.

A judgment against an administrator cannot be conclusive evidence against a stranger of anything except its own existence, and it is not even prima facie evidence against the alienee of the intestate, though the deed under which he holds is void as to the party seeking relief against it.

Alexander & Lancashire v. Quigley's Exrs., 1 Ky. Opin. 230.

(C) MATTERS CONCLUDED.**§ 713. Scope and extent of estoppel in general.**

Where a petition is taken for confessed and a jury is sworn and assesses the damages, it is in effect a verdict for the plaintiff on the whole case, and the right to the land is res adjudicata; and when no appeal is

taken the rights of the parties must be held to be finally settled.

Dodd v. Hays, 11 Ky. Opin. 426.

§ 714. Identity of subject-matter.

Where plaintiff's right to hold a bank liable for conversion was fully adjudicated in the federal court, a court of competent jurisdiction, and there was judgment against him, he can not have the same issue adjudicated in the state court; since the judgment of the federal court not appealed from is conclusive.

Davenport v. Underwood, 8 Ky. Opin. 665.

A former decree in equity between the same parties and for the same subject, even if it be only a judgment of dismissal, is a good defense when pleaded by either party.

Weatherly v. Crooks, 9 Ky. Opin. 192.

Where one sues for damages for breach of contract, and during the trial dismisses his suit as to certain claims made, but secures a judgment for some damages, he can not afterward bring another action for a breach of the same contract to recover for damages, the first judgment being a bar to the second suit; since one can not split up his cause of action for damages.

Mercer v. Conklin, 9 Ky. Opin. 709.

§ 716. Matters in issue.**§ 717.—In general.**

No matter of set-off can be applied to a judgment previously rendered and in full force.

Geoghegan v. Miller's Admr., 5 Ky. Opin. 23.

While the judgment of a court of competent jurisdiction is conclusive between the parties as to matters that were or might have been litigated in the suit, still, where no issue was tendered nor could have been tendered, a party is not bound by the judgment.

Cubberly v. Lyons, 10 Ky. Opin. 712.

Where the trial court decides a cause, its decision and judgment is conclusive of all matters between the parties which are included within the

issues formed, even though the court does not expressly mention every issue involved.

Kendall v. Green, 13 Ky. Opin. 1010.

§ 730. Matters in issue but not decided.
§ 731.—In general.

If a petition contains two counts for distinct causes of action and evidence is offered only in support of one count, the plaintiff may maintain a new action for the cause to support which no evidence was introduced, notwithstanding the verdict and judgment against him.

Cline v. Smith, 13 Ky. Opin. 50.

§ 743. Title of claim to property.

A judgment ordering the sale of real estate will be reversed, where the real estate is not described except as "the house and lot in the pleading mentioned," and such a judgment is also erroneous when it fails to direct the manner in which the sale shall be advertised.

Long v. Spillman, 8 Ky. Opin. 141.

(D) JUDGMENTS IN PARTICULAR CLASSES OF ACTIONS AND PROCEEDINGS.

§ 747. Actions relating to real property.

Where, in an action between parties on one of a series of notes secured by a mortgage, defendant's right to a homestead is put in issue and determined, he can not in a suit against him on a second note again have determined his claim of a homestead in the same land, as the former decision amounts to *res adjudicata*.

Stephens v. Cornelson, 12 Ky. Opin. 50.

XV. LIEN.

§ 754. Creation and existence of lien in general.

The commencement of a suit on a debt does not create a lien on the debtor's real estate; and where such debtor makes a general assignment for his creditors before a judgment is entered against him on such a debt, the creditors, including the judgment creditor, have only such a lien as the

assignment creates, and the judgment creditor has no priority.

Walker v. Lancaster's Assignee, 11 Ky. Opin. 896.

§ 755. Court or other tribunal rendering judgment.

§ 757.—Special, limited, or inferior jurisdiction.

Real estate can not be reached by execution from the police court, since its judgments and executions create no lien on real estate, and when such a levy is made and a bond of indemnity is taken, such bond is without consideration and is void.

McDowell v. Coleman, 11 Ky. Opin. 152.

§ 800. Release, discharge, or extinguishment of lien.

One purchasing a judgment which is a lien on land, and which has never been satisfied, will not lose his lien because the judgment failed to describe the land; but where the holder has had possession of a part of the land, cultivating it before sale to satisfy his lien, he is properly chargeable with rents, which should be credited on his debt.

Wheeler v. Baker, 13 Ky. Opin. 701.

XVII. FOREIGN JUDGMENTS.

§ 813. Grounds of recognition in general.

Before a judgment in personam, rendered by a court of another state, can be treated as *prima facie* evidence of the existence of a debt or legal liability, it must appear, not only that the defendant has been afforded an opportunity to make defense, but in case he fails to appear and make defense, that the court had jurisdiction, notwithstanding his failure to proceed to judgment without such appearance.

Tibbetts v. Summers, 7 Ky. Opin. 350.

§ 814. Judgments of state courts.

§ 822.—Conclusiveness of adjudication.

A judgment rendered in another state against a citizen of this state, upon a summons served within the territorial limits of this state, without appearance by defendant, is void and

can not be the basis of an action in this state.

Tibbetts v. Summers, 7 Ky. Opin. 350.

XVIII. ASSIGNMENT.

§ 844. Operation and effect of transfer in general.

The assignment of a judgment on a note will not operate to arrest the running of the statute of limitations in favor of a surety, though the assignee may not have known that the creditor was not the principal in the note, but only a surety.

Thomas v. Sizemore, 4 Ky. Opin. 367.

XIX. SUSPENSION, ENFORCEMENT, AND REVIVAL.

§ 852. Suspension or stay of proceedings.

The entry of a motion for a new trial on the motion docket, and not prosecuting it in court, or having it entered on the minute or order book, is not sufficient to suspend a judgment.

Calhoun v. King & King, 4 Ky. Opin. 105.

§ 854. Proceedings to enforce judgment.

§ 855.—In general.

The proceeding to revive an action is by order of court or on motion, and the proceeding to revive a judgment is by rule and by action under the code.

Gray's Exrs. v. Patton's Admr., 11 Ky. Opin. 327.

In an equitable action to enforce a judgment, the action becomes a binding obligation against the defendants from the date of their answer admitting liability.

Frederick v. Bethuren, 4 Ky. Opin. 369.

An equitable action to enforce a judgment is notice of the claim of the petition as against subsequent creditors.

Frederick v. Bethuren, 4 Ky. Opin. 369.

Where in an equitable action defendant answers admitting liability,

the answer is in the nature of a garnishment proceeding, and payment by defendant to any other than the petitioner, outside of court, will not affect the right of the petitioner to recover the amount against the defendant.

Frederick v. Bethuren, 4 Ky. Opin. 369.

§ 857. Necessity for revival.

§ 860.—Death of party.

Under § 579, subsec. 6, Civ. Code, relating to vacation of final judgments because of the death of one of the parties before judgment in the action, where the death of a party before judgment is alleged, and not controverted by the answer, and revivor is not shown, the judgment should be set aside.

Mullins v. Emerson, 7 Ky. Opin. 642.

XX. PAYMENT, SATISFACTION, MERGER, AND DISCHARGE.

§ 875. Mode and sufficiency of payment.

The fact that the payment in satisfaction of a judgment was made in another county from that in which the judgment was rendered, can not alter the effect of the payment, since an execution might have been sent to any county in the state.

Allen v. Burks, 7 Ky. Opin. 444.

§ 883. Set-off of judgments.

The right to set off one judgment against another was held not to exist, not only because there is not a mutuality of the parties to the two judgments, but because a third party is a meritorious claimant to one of the judgments.

Mercer v. Henderson, 7 Ky. Opin. 448.

Where the judgment plaintiffs are admittedly insolvent, the chancellor has authority to set off against their judgment so much of their indebtedness to defendant as was not litigated in the action resulting in the judgment.

Kulp & Collins v. English, 6 Ky. Opin. 538.

XXI. ACTIONS ON JUDGMENTS.**(A) DOMESTIC JUDGMENTS.****§ 903. Judgments on which actions may be brought.**

Where defendant was not served with process, and did not enter his appearance or respond to the petition, he is not subject to a judgment in personam, and such a judgment can not be the foundation of an action against him.

Campbell v. Ackerland & Co., 7 Ky. Opin. 129.

§ 904. Conditions precedent.

Before one can apply to a court of equity to enforce his judgment taken in a court of law, he must have execution issued from the clerk's office of the circuit court and a return of no property found.

Perry v. Williams, 9 Ky. Opin. 767.

§ 906. Defenses.

It is not sufficient for a judgment debtor to respond to a rule to enforce the judgment, by setting up the same defense she interposed at the trial before judgment entered.

Cavanaugh v. Fried, 12 Ky. Opin. 700.

§ 911. Parties.

There is no error in permitting a judgment to be enforced in the name of the real parties in interest, or in authorizing an assignee to dispose of the property in controversy under the order of the court, since such assignee is entitled to coerce payment for the benefit of creditors.

Lucas v. Calvert's Assignees, 9 Ky. Opin. 395.

§ 912. Pleading.

Defendant's failure to answer, in suit on a judgment, was an admission of the allegation in the petition that such a judgment was rendered, and cured the defect, if any, in the record filed with the petition.

Follis & Thatcher v. Proctor & Gamble, 5 Ky. Opin. 649.

§ 913.—Declaration, complaint, or petition.

Where judgments and the executions and returns thereon are the basis of an action, it is the duty of

plaintiff to file copies thereof with his petition, and the defendant is not bound to search the records for them.

Mitchell v. Greenwade, 9 Ky. Opin. 660.

A petition on a judgment, to be sufficient, must aver that the judgment sued on was unpaid at the time the suit was brought.

Walker v. Craddock, 8 Ky. Opin. 281.

A petition on a judgment, to be good, must aver that the judgment or some part of it remains unpaid.

McClelland v. Sweezy's Admr., 9 Ky. Opin. 611.

§ 917. Evidence.**§ 918.—Presumptions and burden of proof.**

While the record of a judgment is the best evidence of its existence, a party, by not objecting, may waive the production of the best evidence and consent that its existence and contracts may be proven by secondary evidence.

Duncan v. Moody, 9 Ky. Opin. 267.

§ 922. Judgment, and enforcement thereof.

In an action to enforce the collection of a judgment, the circuit court has no authority to render a second judgment in personam.

Armstrong v. Hudgens, 4 Ky. Opin. 683.

(B) FOREIGN JUDGMENTS.**§ 930. Defenses.**

Where a judgment is rendered in Ohio, the court having jurisdiction over the subject-matter and parties, no defense can be interposed to a suit brought upon it in Kentucky which would have constituted a defense in the original action in Ohio.

Tilman v. Carey, 8 Ky. Opin. 336.

§ 936. Process and appearance.

In an action in Kentucky on judgments rendered in the state of Pennsylvania, where there is no evidence showing the manner of service of process required by the law of Pennsylvania, the court must adjudge that the judgments sued on are void, the serv-

ice not being sufficient under the law of Kentucky.

Duboy & Bros. v. Roberts, 6 Ky. Opin. 579.

§ 937. Pleading.

§ 938.—Declaration, complaint, or petition.

A petition seeking to recover on a foreign judgment is fatally defective which fails to aver that the court entered such judgment had jurisdiction either of the person or of the subject-matter of the action.

Polly v. Smith, 9 Ky. Opin. 766.

JUDICIAL NOTICE.

See Evidence, I; Pleading, § 6.

As to United States treasury notes, see Counterfeiting, § 16.

By Court of Appeals of papers not part of record, see Appeal, § 836.

Of indivisibility of city lot, see Partition, § 77.

That original books and papers used on trial have been destroyed by fire, see Appeal, § 906.

JUDICIAL SALES.

§ 1. Nature and essentials in general.

§ 3. Judgment, order or decree.

§ 6. Appraisal.

§ 7. Authority and powers in making sale in general.

§ 8. Mode of sale.

§ 9. Place.

§ 11. Notice.

§ 13. Sale in parcels.

§ 14. Order of offering for sale.

§ 15. Conduct in general.

§ 16. Terms and conditions.

§ 17. Persons who may purchase.

§ 18. Bids.

§ 20.—Acceptance or rejection.

§ 21. Payment of bid.

§ 24. Failure to comply with bid.

§ 26.—Resale.

§ 27.—Liability of bidders.

§ 28.—Summary proceedings to compel payment.

§ 29.—Actions on bids.

§ 30. Report or return.

§ 31. Confirmation.

§ 32. Persons who may question validity.

§ 33. Ratification of invalid sale.

§ 34. Opening or vacating.

§ 35.—Grounds in general.

§ 36.—Defects or irregularities in judgment, decree, or order.

§ 37.—Irregularities or misconduct affecting sale.

§ 38.—Mistake, surprise, or accident.

§ 39.—Inadequacy of price.

§ 40.—Inadequacy of price in connection with other objections.

§ 45. Actions to set aside.

§ 46. Resale on setting aside.

§ 47. Collateral attack.

§ 48. Operation and effect in general.

§ 49. Title and rights of purchaser.

§ 50.—In general.

§ 51.—Possession.

§ 53.—Defects or irregularities in judgment, decree, order or sale.

§ 54.—Modification, vacation, or reversal of judgment, decree, or order.

§ 55.—Opening or vacation of sale.

§ 56. Liabilities of purchasers.

§ 57. Assignees of certificates of sale.

§ 59. Redemption.

§ 61. Conveyance to purchaser.

§ 62. Proceeds.

§ 63. Fees and expenses.

Advertisement of sale by court commissioner, see Court Commissioners, § 4.

Invalidity of sale, see Court Commissioners, § 4.

Sale of land by court commissioners, see Court Commissioners, § 4.

§ 1. Nature and essentials in general.

Encumbered property should not be sold until all the parties having claim thereon are before the court.

Hazelrigg v. Williams, 5 Ky. Opin. 353.

Where a sale of lands under levy issued legally before that time is discharged by the release of the purchaser of the land at the sale thereof, a subsequent issue of a venditioni exponas and a second sale thereunder is void; and the release by the purchaser under the levy was a termination of the authority of the sheriff and

the levy, and operated as notice to the defendants in the execution that they might not expect or look to further action of the sheriff upon that levy.

Hayworth v. Ramsey, 1 Ky. Opin. 413.

It is universally understood that sales by a commissioner under decretal orders are mere offers and not sales until confirmed by the court, which should always set them aside when the property has been sacrificed and reliable bids to advance the price have been made before payment of the purchase price or confirmation of the sale.

Triplett v. Chrisman, 1 Ky. Opin. 579.

It is error to adjudge the sale of land in the absence of an affidavit that the defendant has no personal property.

Williamson v. Jones, 2 Ky. Opin. 97.

Where, before a sale by a commissioner is confirmed, the litigants for whose benefit the sale was made, notify the commissioner that they want the judgment executed, a subsequent confirmation of the sale by the court will be dismissed.

White v. Hickey, 4 Ky. Opin. 57.

§ 3. Judgment, order or decree.

It is erroneous to order the sale of land without either definite pleading for that purpose or such evidence of title as is reasonably necessary to assure the purchaser and to enable the commissioner to sell and the court to convey the title.

Thomas' Admr. v. Turner, 4 Ky. Opin. 172.

An order of court, showing that a deed was examined and approved, though not endorsed thereon, must be taken as a substantial compliance with the statute, and it is the highest evidence thereof, as the endorsement is merely directory and would be insufficient without the order of court.

Cox's Exr. v. Swigert, 3 Ky. Opin. 56.

A chancellor should never subject land to danger of a sacrifice by selling an uncertain interest but should al-

ways have the interest so defined as to be able to pass to the purchaser a perfect title.

Haynes v. Ditto, 3 Ky. Opin. 584.

A sale of land under a judgment in which the defendant, a feme covert, was not joined by her husband in an amended petition is void.

Frain v. Luen & Steinweide, 4 Ky. Opin. 449.

A judgment for the sale of land is within the jurisdiction of the court, where the land lies in the county where the court sits, and is sold at the county seat, and the fact that the land sold for less than two-thirds of its value will not prevent the issuing of the writ of possession, where the notes upon which the judgment of sale was entered were executed before the law was enacted requiring such property to be appraised before being sold.

Reilly v. Young, 12 Ky. Opin. 474.

After a sale of real estate is ordered by this court to pay creditors, the assignee in bankruptcy of the debtor has a right to be made a party and to be heard, and if he is made a party before a final distribution of the assets, he will be allowed to appeal for the creditors.

Bristow v. Peters, 12 Ky. Opin. 750.

§ 6. Appraisal.

Where there is no direction given a commissioner by the judgment to value the property sold, and not being subject to appraisal, still he fixes its value and requires at the sale that it should bring two-thirds of such value, the rights of the creditor are prejudiced, as he is entitled to have such property sold for what it will bring.

Boyd v. Anderson, 11 Ky. Opin. 134.

Where land is appraised and purchased at a judicial sale for less than two-thirds of its value, the question as to the validity of such sale may be raised upon exceptions filed to the commissioner's report, but where no exceptions are filed and the sale is confirmed, and a writ of possession issues, it becomes final and valid.

Smith v. Gowdy's Admr., 11 Ky. Opin. 430.

Where a commissioner is ordered to make sale of land and the sale is consented to by all the parties, and he sells all the land described in the petition without any appraisement first being had, the sale will be set aside at the instance of creditors even if the heirs acquiesce in it, since the Act of 1878 (I Acts 1878, ch. 964) requires an appraisement before sale and allows parties the right to redeem if the sale does not bring two-thirds of its value as fixed by the appraisement.

Cantrill v. Perry's Admr., 13 Ky. Opin. 807.

Where a judgment for the sale of real estate wrongfully provided for the appraisal of the property, but no objection is made to it, and an appraisement is made and the property sold and bid in with notice that a right to redeem within twelve months was in effect reserved in the judgment, neither the owner nor purchaser can afterward insist upon a change of the terms of sale, and the court has no power at a subsequent term to modify the judgment.

McBride v. Hoffman, 13 Ky. Opin. 1020.

§ 7. Authority and powers in making sale in general.

Only a substantial compliance with every requirement of the statute will give the court jurisdiction to sell property upon constructive service by warning order.

Moore v. Speed, 7 Ky. Opin. 238.

The master commissioner will not sell more property than will be sufficient to pay the debts, and if upon the coming in of his report it shall appear that the taxes are not due, the amount thereof will be paid to the appellant, if not needed to pay creditors.

Steadman v. Oldham, 5 Ky. Opin. 279.

A commissioner has no discretionary power, and it is his duty to conform his action to the direction of the judgment.

Abell v. Duparcy, 1 Ky. Opin. 40.

§ 8. Mode of sale.

Where a judgment excepts from a sale of lands, "except the share of B one of the heirs above," etc., the com-

missioner has no power to sell all the land, but must first set apart the portion coming to the heir.

Burch v. Perkins, 4 Ky. Opin. 498.

A judicial sale will be set aside when the land sold for more than the amount of the judgment, since the commissioner should have offered to sell only so much of the land as would satisfy the judgment.

Smith v. Gayden, 10 Ky. Opin. 549.

§ 9. Place.

Where a judgment requires that the sale of land be made at the court house door, and sale is made within the court room with closed doors, at which the property did not bring more than half its value, the sale will be set aside.

Sanders' Exrs. v. Sanders, 7 Ky. Opin. 715.

When the sale of land is to be on the premises, the commissioner should be ordered to make it on a day certain; when it is to be made at the court house door, it is sufficient to direct him to sell on the first day of a court to be held for the county.

Owsley v. Cook & Co., 1 Ky. Opin. 518.

A sale by the sheriff of land, on any day other than the first day of a circuit or county court, is without authority and void.

Wile v. Sweeney, 4 Ky. Opin. 59.

§ 11. Notice.

The rule is that to be a purchaser for value without notice the party must have both received the conveyance and paid the entire consideration; and the rule does not extend further than to give the party asserting a prior equitable right, the right to enforce his claim against a purchaser to the extent of purchase-money owing or paid after notice of equity.

Hard v. Alexander, 1 Ky. Opin. 525.

The failure of a commissioner to advertise the terms of a sale as required by the judgment is error.

Abell v. Duparcy, 1 Ky. Opin. 246.

Where a commissioner does not advertise the true terms of the credit

upon which the land was to be sold as required by the judgment, a sale thereunder will be vacated.

Abell v. Duparcy, 1 Ky. Opin. 40.

An attorney who admits that he recovered the judgment for the satisfaction of which the land was sold, and was present at the sale, was the surety of the purchaser in the sale bond, and must have known all about the manner of making the sale, is not an innocent purchaser without notice of the imperfection of his vendor's title.

Underwood v. Bowles, 2 Ky. Opin. 321.

A failure to advertise land for sale as required by the judgment for sale is error in that it may prevent competition by reason of the time and place not being known.

Anderson v. Glenn, 2 Ky. Opin. 509.

The law does not prescribe how judicial sales, where mortgages are foreclosed, shall be advertised, and it is error for a judgment to fail to designate the manner in which such sales shall be advertised.

Randall v. Randall, 8 Ky. Opin. 178.

§ 13. Sale in parcels.

A chancellor may allow a judgment creditor to satisfy his debt out of certain property, rather than compel him to resort to other property by which the whole or part of the debt will be lost.

Hoertz v. Crawford's Admr., 6 Ky. Opin. 206.

It is error to sell, as a whole, the entire interest of one of the devisees of an estate, where the property embraced in the sale, was devised under separate clauses of a will, with different limitations thereon, since before such a sale should be declared void, the purchase money should be refunded upon equitable terms.

Bryan v. Wade, 3 Ky. Opin. 213.

Where a sheriff at a judicial sale, by reason of failure to enter proper credit of full payment made by a judgment debtor, sold more land than necessary, the debtor, not using ordi-

nary diligence for more than a year to discover this fact, induced defendant to purchase the land so sold from the assignee of the execution purchaser, it estops plaintiff from asserting a claim with or against such purchaser.

Burford v. Burford, 4 Ky. Opin. 463.

Where there are several tracts of land to be sold by a commissioner the court should order them sold separately.

Fox v. Apperson & Reid, 8 Ky. Opin. 233.

Where real estate is ordered sold the judgment should direct how and where the sale shall be made and the length of time it shall be advertised, and where real estate ordered sold consists of separate tracts not adjoining they should be ordered sold separately.

Hume v. Guilfoyle, 8 Ky. Opin. 487.

The court will not order the whole of a lot to be sold where it is not necessary to pay the amount of a lien adjudged against it.

Turpin v. Kuqua, 10 Ky. Opin. 600.

It is not error to decree a sale of an entire tract of land where to divide it would impair its value.

Earl v. Porter, 11 Ky. Opin. 85.

When a decree for the sale of land directs a sale in parcels, and, if the several portions would not bring enough to pay the debts, the commissioner was directed to sell the land in a body, this court, in the absence of a record showing otherwise, will presume that the commissioner discharged his duty as directed.

Calloway v. Green, 11 Ky. Opin. 121.

§ 14. Order of offering for sale.

Where an officer offers land for sale, he should attempt, before closing the sale of the land in solido, to raise the amount of the bid by offering a designated side or end of the tract or lot; the defendants in the execution being infants, not being present at the sale, as must be assumed, and in-

capable of making the designation if they had been present.

Underwood v. Bowles, 2 Ky. Opin. 321.

Where by section 812, Civ. Code, in the sale of a small portion of real estate in a city, if defendant does not require less than the whole to be sold, where less will produce the debt, the officer making the sale may exercise his discretion, with a view to the interest of the defendant, whether to sell the whole, or less than the whole, as he may or not think it advantageously susceptible of division; if the whole is sold by the officer, under the power conferred, the defendants being infants, the officer must exercise the discretion conferred upon him, by reason of their disability, to direct how the sale should be made, and the facts should be stated in the return.

Underwood v. Bowles, 2 Ky. Opin. 321.

Where two tracts of land are to be sold to satisfy separate liens on each, it is error to order a sale in gross for the amount due on both tracts.

Johns v. Forbes, 1 Ky. Opin. 307.

It is error to adjudge that an entire tract of land be sold to satisfy a judgment when it is not made to appear that it was not reasonably susceptible of division.

McQuarry v. Rochester, 2 Ky. Opin. 112.

It is error to adjudge that land be sold as a whole when it does not appear that it is not susceptible of division, or to direct that the whole of the proceeds be paid to the creditor, although it might bring twice the amount of the debt.

Ashurst v. Bailey, 2 Ky. Opin. 78.

§ 15. Conduct in general.

Where it appears that if a judgment creditor is compelled to exhaust the proceeds of G's property in the satisfaction of his debt before receiving any part of the proceeds of T's property, he will lose his entire debt, and if compelled to apportion his claim on the two funds in proportion to their respective amounts he will lose the greater portion of his debt, the equitable rule requiring a creditor

whose debt is secured by funds, to resort principally to that fund upon which other creditors have no claim, should not be enforced.

Hoertz v. Crawford's Admr., 6 Ky. Opin. 206.

§ 16. Terms and conditions.

A rule of court to compel an accepted bidder at a judicial sale to complete his purchase by giving bond that he will do so, is a reasonable rule and may be enforced.

Robinson v. Waggoner, 9 Ky. Opin. 338.

§ 17. Persons who may purchase.

A sale of land, by a commissioner, made to himself by a party standing in the relation of trustee or agent, will not be permitted to stand, if any profit or advantage was made by the purchase.

Mitchell v. Borders, 3 Ky. Opin. 206.

It is contrary to the policy of the law to sanction the purchase by a commissioner from himself either openly or through others of property that he as commissioner is required to sell to the highest bidder.

Bagby v. Eversole, 13 Ky. Opin. 77.

§ 18. Bids.

Where land is sold by a chancellor, the bond executed by a purchaser has the force and effect of a sale bond at law.

Hill v. Hathaway & Hall, 7 Ky. Opin. 176.

Where real estate has been regularly and fairly sold at a fair price the first bidder, having no vested rights before confirmation, can not complain at a second sale, at which another bids more than he is willing to give.

Dudley v. Jeffries, 2 Ky. Opin. 459.

Where evidence shows a fraudulent combination to prohibit competition in the bidding at a judicial sale of land, but that at the sale the land sold at its full value, it is harmless error and not subject to rescission by the court.

De Jurnett v. Soper, 4 Ky. Opin. 351.

§ 20.—Acceptance or rejection.

A commissioner in selling real estate at public sale has no right to

summarily adjudge a party insolvent and presumably unable to give the bond and surety, and therefore to reject the highest bid from such a bidder and accept the next highest bid.

Morton v. Moore, 11 Ky. Opin. 938.

§ 21. Payment of bid.

Lapse of time, and the recitals in a commissioner's deed, were held conclusive of payment of purchase price of land sold by the commissioner.

Cox's Exr. v. Swigert, 3 Ky. Opin. 56.

The forced election of the purchaser is erroneous, after the appearance to the suit of one of the claimants, as he should neither be compelled to pay the amount of purchase nor accept the deed until an adjudication of title.

Treadway v. Walden, 3 Ky. Opin. 149.

§ 24. Failure to comply with bid.

Where a purchaser at judicial sale on failure to comply with the terms thereof, loses his rights thereunder, the property may be transferred to a third party or a resale ordered, without the consent of the original purchaser.

Allen v. Glover, 3 Ky. Opin. 118.

One who purchases property at a judicial sale, and does not comply with the terms thereof, loses his rights thereunder, and it may be transferred to a third party by the court, or a resale may be ordered.

Allen v. Glover, 3 Ky. Opin. 118.

Exceptions to the sale of land must be made before the order of confirmation is entered, unless some sufficient reason for not excepting is shown.

Youell v. Gaines, 1 Ky. Opin. 163.

§ 26.—Resale.

Where one bids in personal property at a public sale and makes a small payment thereon, and turns it over to the auctioneer to hold a day or two until he completes payment, but fails to complete such payment, such property may be resold at public sale at the instance of the creditor who first had it sold, and if sold for less than the balance due on the first sale such creditor may collect from such first buyer the difference between the

sum of the first sale and the second sale.

Burns v. Roberts, 9 Ky. Opin. 379.

A surety on a sale bond executed for the price of land sold at judicial sale is bound for the whole sum due on the bond, and where on default the land for which the bond was given failed to sell for enough to satisfy the bond he is required to pay the balance.

Long v. Burkham, 10 Ky. Opin. 527.

§ 27.—Liability of bidders.

The purchaser of land at decretal sale will be required to execute bond for purchase money, if he can get a good title at the time of the sale or in a reasonable time thereafter, and in case of his failing to do so, the land may be resold, and if it does not then sell for as much as he bid for it, he would be responsible for the difference.

Fogle v. Violet, 2 Ky. Opin. 65.

§ 28.—Summary proceedings to compel payment.

One who was not a party to the record either as a litigant, purchaser, bondsman, attorney or officer of the court, is not liable to be proceeded against by the summary proceeding of rule and attachment.

Fox & Stevens v. Brown, 7 Ky. Opin. 253.

Where a purchaser under a judgment was not a party to the suit, the purchase does not subject him to the jurisdiction of the chancellor further than is necessary to enforce the performance of his agreement as an accepted bidder.

Fox & Stevens v. Brown, 7 Ky. Opin. 253.

§ 29.—Actions on bids.

One who has signed a sale bond as surety may successfully defend, where more than twelve months elapse from the maturity of the bond, and no execution thereon has been issued, since in such a case the surety is released, and it is the duty of the clerk to endorse on the execution that the surety is released.

Park v. Cline, 13 Ky. Opin. 580.

§ 30. Report or return.

Where complainants believe a commissioner's report to be prejudicial to them, they should present their exceptions within a reasonable time, and not on the last day of the next succeeding term of court.

Doom v. Doom, 3 Ky. Opin. 441.

Less than three days has never been recognized as a reasonable time to accept a report of sale.

Williamson v. Jones, 2 Ky. Opin. 97.

The commissioner's report of sale fails to describe the land sold so that same can be identified with legal certainty, and the purchaser, therefore, being unable to get a good title was not compelled to pay the purchase-money.

Thompson v. Bartley, 3 Ky. Opin. 506.

Where the marshal is directed by the decree to advertise a sale by posting a notice on the court house door and one "on or near" the premises to be sold, a return is sufficient which shows the posting on the court house door and one "on or near" the premises, without stating the exact place where such last posting was made.

Slaughter's Guardian v. Graham's Exr., 12 Ky. Opin. 317.

An insufficient description in the petition and commissioner's report of the real estate sold, will not render the sale void where the purchaser is able to identify the land, but if there is a defective description this court can not remedy it, unless the purchaser has been made a party and had a chance to be heard.

Buckner & Terrell v. Samuels, 13 Ky. Opin. 363.

§ 31. Confirmation.

Where the sale of real estate has been confirmed, the contract is treated as executed, and no mere contingent incumbrances, such as potential right of dower, can be set up as a defense against the payment of the purchase-money.

Howe v. Arnold's Admr., 10 Ky. Opin. 542.

Generally, sales made by the chancellor should be confirmed before any

order of possession to the purchaser is made, yet if possession should be given, this will not deprive the court of the power to set aside the sale, for any sufficient cause, on the motion of either party, in which case the purchaser would be liable for rents should the purchase be rejected.

Rhodus v. Ogg, 1 Ky. Opin. 436.

A purchaser has no right to claim land bid off at a decretal sale until the sale is confirmed, as it does not become a sale and purchase until then.

Lane v. Roberson, 1 Ky. Opin. 520.

Where after judgment ordering a sale of land, and before the sale had taken place, the defendant died, notwithstanding which, and without a revivor, the commissioner proceeded with the sale, and same was confirmed, the sale and confirmation were nullities, as there were no parties before the court.

Kelley v. Craddock, 2 Ky. Opin. 295.

Bidders at judicial sales do not become the purchaser until confirmed by the chancellor, but stand as merely a preferred bidder.

Tevis v. Ireland, 3 Ky. Opin. 151.

In a suit to confirm title to a purchase of lands, and there be non-resident or unknown heirs, the court should not order them proceeded against as such, as time would bar their claim on such judgment.

Treadway v. Walden, 3 Ky. Opin. 149.

A conveyance executed in obedience to an order of court is a sufficient confirmation of the sale.

Edwards v. Carter, 4 Ky. Opin. 581.

A petition, seeking to recover a consideration paid for a transfer of a claim to lands purchased at a decretal sale, to constitute a cause of action, must allege an undertaking or agreement to refund the money so paid on the failure of the court to confirm the sale, or any other contingency.

Williams v. Mills, 4 Ky. Opin. 116.

Where no appeal is taken from an order confirming a master commissioner's report of sale, the Court of

Appeals will not review the action of the lower court in that particular.

Patrick v. Bohannon, 5 Ky. Opin. 259.

Although a purchaser at the sale of the commissioner of a court of equity is only a preferred bidder until the sale is consummated by the chancellor, yet the chancellor can not arbitrarily refuse to confirm the sale, but must act under his authority as regulated by the fixed rules of equity.

Clasby v. Barnett, 6 Ky. Opin. 711.

Where all the parties directly interested in the sale of land are seeking confirmation of the sale and are desirous of perfecting the title, and the defect consists in the failure to make an order approving the execution of the bonds of guardians of infant defendants, the defect may be cured by an order nunc pro tunc, or by the execution of new bonds under supplemental proceedings.

Miller v. Rogers, 6 Ky. Opin. 697.

Where a purchaser of land at a judicial sale made no objection to the order of confirmation until nearly a year thereafter, and in response to a rule fails to suggest the specific defects which render his title imperfect, he occupies the position of one seeking to rescind an executed contract, and he should disclose the facts entitling him to relief.

Hite v. Hoethide, 6 Ky. Opin. 590.

Where real estate is sold at judicial sale in the settlement of an estate, and no one is complaining and filing exceptions, except the purchaser, the sale, not being void, vests in him the title, and when all the parties to the record are satisfied with such sale, such sale should be confirmed.

Brackman's Admr. v. Allison, 10 Ky. Opin. 723.

A purchaser of real estate at a judicial sale buys with the knowledge that such sale is subject to the confirmation of the chancellor, and he is not entitled to collect the rents on said real estate until the sale is confirmed and possession delivered to him.

Brown v. Berkley, 11 Ky. Opin. 359.

An order confirming a sale of land is conclusive and not subject to be set aside after the expiration of the term, unless fraud or mistake be alleged and proved.

Lisle v. Lisle's Admr., 12 Ky. Opin. 71.

An order of court confirming a judicial sale of real estate is in the nature of a final judgment, and the court has not the power to relieve the purchaser by an order thereafter made, even in cases where the title is defective.

Taylor v. Helm, 12 Ky. Opin. 310.

Where one buys real estate at a judicial sale, and the title is good, he can not prevent the confirmation of the sale simply because he then thinks he offered too much for the property.

Smizer v. Inskeep, 12 Ky. Opin. 668.

§ 32. Persons who may question validity.

The creditor and not the debtor is the party to except to report of sale on account of the failure of the purchaser to execute a sale bond.

Flournoy v. Morris, 5 Ky. Opin. 47.

Where a receiver buys property at a judicial sale, whether authorized to do so or not, even though the proper persons might have had the sale quashed or could have held him as trustee, another person not interested in the sale can not complain of the irregularity or illegality of such sale.

Rogers v. Moore, 9 Ky. Opin. 311.

Where a nonresident, who is the owner of an undivided interest in real estate, is sued with the other owners to subject the real estate to sale to pay a debt, judgment is taken against all the owners, and a brother of the nonresident, who is also the owner of an interest in the real estate, appears for the nonresident without authority to do so, and judgment is entered against all the defendants, but the brother causes the interest of the nonresident alone to be sold to pay the judgment, and buys such interest at the sale, he will secure no title thereto, and the nonresident is entitled to recover such land, together with the rents thereof, and her interest is liable

only for a pro rata part of such debt.
Skillman v. Atchison, 11 Ky. Opin.
105.

§ 33. Ratification of invalid sale.

Where one who is a sole defendant in a suit to subject real estate to pay his debts dies after a commissioner is appointed to sell the property, an order made to confirm a sale is void and no rights could be acquired under it, since to make a valid record the court must have jurisdiction.

Wheatley v. Hays' Heirs, 13 Ky. Opin. 218.

§ 34. Opening or vacating.

A purchaser of property at a void judicial sale of an infant's property, will not be prejudiced by a vacation of the sale, the purchase-money having been secured only by a lien on the property.

Wandling v. Kennedy, 4 Ky. Opin. 305.

A sale by a commissioner of land, substantially conformable to the law, in the absence of unfairness or fraud, and for a fair price will not be set aside.

Cook v. Sanders, 4 Ky. Opin. 350.

A decretal sale of land will not be set aside, where the party complaining has failed to bring in a party when it was his duty to do so.

Threlkeld v. Jones, 1 Ky. Opin. 369.

A motion made to set aside the sale of lands for irregularity in the acts of the officers of the court, is not restricted to the time prescribed in chapter 36, Rev. Stat. (1 Stanton, 490), providing that "sales made under execution by fraud, cavil, or collusion may be set aside on the motion of the person aggrieved or by bill of equity, if by motion, it must be commenced within one year from the sale," and in the absence of fraud, cavil, or collusion this section will not apply.

Hayworth v. Ramsey, 1 Ky. Opin. 413.

Upon the reversal of a judgment of sale of land, the owner is entitled to restitution, where the creditor is the

purchaser, notwithstanding he has transferred his purchase to a stranger.
Williamson v. Jones, 2 Ky. Opin. 97.

Where at a decretal sale, the land was sold to B for \$9,175, whereupon P threatened that unless he was paid \$500 by B he would reopen the sale and bid in the property, and the amount was paid him; and a petition was filed by the heirs for whom the sale was made, to cancel same on the ground of a fraudulent combination between B and P to keep others from bidding on the property, the sale should not be set aside merely to punish persons for such dishonorable practice.

Jack v. Bayless, 2 Ky. Opin. 405.

When a judgment has been reversed, a sale thereunder can be set aside only upon equitable principles, or the defendant may elect to take the purchase price and the sale will be confirmed.

Ott v. Ott's Admr., 2 Ky. Opin. 114.

When the purchaser at a decretal sale can not get the legal title, the sale will be set aside.

Roberts v. Elliott, 2 Ky. Opin. 71.

A sale of lands under an order of the court, where bond executed by the purchaser, and the sale confirmed without exception to the commissioner's report filed prior thereto, is not susceptible of rescission, unless the purchaser be prejudiced by being required to pay more than is adjudged in his sale bond.

Shean v. Fletcher, 2 Ky. Opin. 413.

Upon rescission of a contract of purchase of a house and lot, under a judicial sale, where the purchaser is put in possession, it is not error to charge rent upon same from the time of his entering into possession, where he is allowed for all improvements, and interest on purchase-money paid.

Miller v. Hall, 3 Ky. Opin. 94.

A judicial sale of land, under an attachment proceeding against a then non-resident, will not be set aside in the absence of fraud and collusion, even though a former judgment in the

same proceedings had been reversed for lack of proper service.

Beazley v. Mershon, 3 Ky. Opin. 21.

The chancellor does not abuse a sound discretion in reopening a sale, where a bona fide advance bid of twenty per cent. properly secured, is made.

Tevis v. Ireland, 3 Ky. Opin. 151.

Where more land was sold than necessary to settle the amount a defendant owed, it should be set aside on equitable principles, adjudging the purchaser a lien for the amount he actually paid therefor.

Anderson v. Lusk, 3 Ky. Opin. 610.

A sale by order of court, for the interest of minors, though the widow of the testator was given a contingent life interest, was held not to be in contravention of the expressed provisions of the will, as it was no more than what would have been allowable if it descended according to law, and it will not be disturbed after more than thirty years adverse holding under the sale.

Forgy v. Tanner, 3 Ky. Opin. 670.

In no event will a decretal sale be set aside by the party procuring it without tendering the purchase money.

Campbell v. Flournoy, 4 Ky. Opin. 690.

The first sale under order of court must be set aside, before a second sale is ordered.

Cruelle v. Simon, 4 Ky. Opin. 288.

Irregularities which do not affect the substantial rights of the parties are not sufficient to set aside a sale made under a judgment where the confirmation is made without objection.

Jones v. Robinson, 5 Ky. Opin. 371.

When a defendant constructively summoned has not been kept away by unavoidable accident or casualty, and no fraud or misconduct on the part of the plaintiff is shown, a judicial sale will not be set aside upon the mere

ground that the property did not sell for its full value.

Walden v. Humphreys, 5 Ky. Opin. 345.

§ 35.—Grounds in general.

One who buys real estate subject to a mortgage can not remain quiet during a sale made as the result of foreclosure until after such sale is confirmed, and then, more than eight years after an innocent purchaser has possessed it, have the sale set aside for any technical reason, or for any cause which from the records he knew or ought to have known at the time of the sale.

Greer v. Warburtons Exr., 8 Ky. Opin. 362.

After a judicial sale has been confirmed it can not be set aside for mere deficiency in quantity or for errors in the boundary.

Adkins v. Gillis, 10 Ky. Opin. 108.

Where a judgment for the sale of real estate is not void but merely erroneous the purchaser at such sale will acquire title.

Tribble v. Terrill, 10 Ky. Opin. 502.

A purchaser at judicial sale is liable for an excess in the land purchased, but the owner of land sold at judicial sale, not being the vendor, is not liable for a deficit; and for the same reason a creditor for whose debt such land is sold is not liable; and in such cases the court is the vendor, and unless the deficiency be such as to authorize the court to set it aside, there appears no ground upon which a purchaser can be relieved on account of a mere deficit, when the land sells for no more than the debt.

Howe v. Arnold's Admr., 10 Ky. Opin. 542.

Where an appeal is pending from the common pleas court directing a tract of land to be sold to pay a debt, and the judgment was not superseded, and within a month the land is sold and report of sale made some months thereafter, no exceptions having been filed thereto or objections of any kind made; and it was confirmed and a deed ordered made, presented to the court and certified for record, and pos-

session awarded to the purchaser, without any objections being made by any one, and without any information being given to the court of a pending appeal, the party appealing, by reason of his negligence, can not successfully attack such sale and have it set aside.

Rose v. Taylor's Exr., 10 Ky. Opin. 529.

There is no warranty in judicial sales and a purchaser at such a sale can not secure relief in the absence of fraud or other causes sufficient to annul and set aside a judgment rendered, and he has no right upon the ground of the property purchased being of no value to recover of the plaintiff in the action the price paid by him for such property.

Taylor v. Bank of Woodford, 11 Ky. Opin. 794.

Where it is shown that property sold by the marshal of the city of Louisville brought only about half its value, and the marshal failed to advertise the sale by posting an advertisement on the premises, the sale will be set aside.

O'Doherty v. Lewis, 11 Ky. Opin. 901.

Where the term of court, at which a judgment for the sale of land and the order confirming the sale were entered, has expired the judgment and order of sale can only be vacated for fraud practiced by the successful party in obtaining the judgment and order.

McCarty v. Payne, 12 Ky. Opin. 248.

A judgment and order confirming a sale of real estate will be vacated, where the appellant was misled by the appellee, by reason of the latter's promise to make the land sold pay his debt, where it is evident that, but for such promise, the land would have brought at least the purchase-money due the original vendor.

Hayden v. Smith, 12 Ky. Opin. 250.

A sale of real estate by a commissioner for its full value will not be set aside because of the claim by the commissioner that he was interested in the purchase, where the proof fairly shows that if he ever acquired an in-

terest in the land he acquired it after the sale by releasing a lien held by him thereon.

Adams v. McClary, 13 Ky. Opin. 211.

No sale of real estate will be set aside affecting the purchaser of real estate, where such purchaser is not made a party to the action, for he is entitled to be heard before his rights can be disturbed.

Buckner & Terrel v. Samuels, 13 Ky. Opin. 363.

Where a judgment of sale is entered by consent, parties thus consenting waive their right to object to the sale thereafter.

Movar v. Crawley, 13 Ky. Opin. 733.

Where several acres of P's land were sold at commissioner's sale to J, who executed his bonds for the purchase-money and at the time of the sale gave P a written contract agreeing that if he would pay off the bonds at or before twelve months from the day of sale he should have the land back, it is held that where P failed to pay such bonds he could not successfully assert any claim to such land.

Pigg v. Jordan, 13 Ky. Opin. 743.

While in the sale of real estate the judgment should be so certain and specific as to the real estate to be sold as to enable the commissioner to discharge his duty without reference to any other paper or pleading in the cause, where the judgment does describe the real estate to be sold, but contains no specific description of parcels of the land which had previously been sold by the defendant and directed in the judgment to be excepted, the omission will not render the sale invalid.

Johns v. Brown, 13 Ky. Opin. 810.

An order of the court confirming a sale of real estate, not void, will not be set aside upon the application of a party who was regularly before the court when the order was made, and who makes no objection thereto for eleven years thereafter.

Randall v. Redd & Bros., 13 Ky. Opin. 1026.

§ 36.—Defects or irregularities in judgment, decree, or order.

The petition, in a proceeding to sell land, should set forth the land sought to be sold, and the description given in the judgment should be such as to enable the commissioner to identify the land without resorting to extraneous evidence.

Barber & Dick v. Black, 7 Ky. Opin. 388.

The description of property in the petition and mortgage attached thereto as an exhibit in a proceeding to sell, as being property situated on Main street in a named town, is not sufficient to support a judgment.

King v. Welch's Admr., 7 Ky. Opin. 385.

A judgment directing the sale of real estate, failing to direct the commissioner how much money he is to raise by the sale, is void; and such a judgment can not be amended by order of the court after the parties had ceased to be in court for any purpose other than the execution of the order of sale.

Choice v. King, 8 Ky. Opin. 115.

Where a decree directs the sale of land to be made upon a credit of three months, when the statute requires that it must not be less than six months, and the land is sold and bought in by the holder of the judgment, and he entered no objection or exception to the decree or sale, and the land sold for more than two-thirds of its appraised value, and the debtor is making no objections, the decree will not be held void by reason of the direction to sell upon a credit of three months.

Stephens v. Smith, 13 Ky. Opin. 514.

The land ordered sold in a proceeding for its sale which does not describe the land except in a copy of the levy of the marshal upon the land filed with the petition as an exhibit, and where the judgment of sale refers to this exhibit for a description, and does not inform a bidder what land the commissioner is selling, such a judgment is erroneous.

Trumbo's Exr. v. Murphy, Tiernan & Co., 13 Ky. Opin. 528.

Where the court has jurisdiction of the parties and of the subject-matter, its judgment unappealed from is final; and the title under a sale ordered and confirmed passes title to the purchaser, and irregularities in such a judgment will not defeat such title.

Bess v. Hagan, 13 Ky. Opin. 708.

§ 37.—Irregularities or misconduct affecting sale.

Where a bond is taken by a commissioner for the balance of the purchase-money of land sold, but which is not reported to the court, a title secured through an execution on such bond and sale thereunder by the sheriff is not good, and will be set aside.

Fortney v. Moore, 8 Ky. Opin. 288.

One buying real estate at judicial sale is not bound to inspect the premises, but has a right to rely upon the accuracy and truthfulness of the description which is given by the judgment and the master's advertisement, and he can not be compelled to accept a conveyance unless it conforms substantially to the description by which he was induced to bid.

Delph v. Hewitt, 8 Ky. Opin. 847.

An irregularity in the mode of appraisal will not affect the rights of a purchaser at sheriff's sale; and the fact that one of the appraisers becomes the purchaser can not affect such purchase where there is nothing in the record tending to show bad faith in the transaction.

Shepperd v. Lexington & Carter County Min. Co., 9 Ky. Opin. 33.

Where a sale of slightly more of a lot of real estate than was necessary to pay the debt, interest and costs, is made, it is at most but an irregularity and will not render the judgment or sale void.

Cochran v. Triplett's Exrs., 9 Ky. Opin. 280.

When there is such an irregularity in a judicial sale of real estate that it ought to have been set aside, even though the judgment of sale was valid, and the irregularity appears on the record, the order confirming the sale

may be reversed without the judgment being reversed.

Hollis v. Owensboro Sav. Bank, 10 Ky. Opin. 495.

Where there are irregularities on the part of the sheriff in making a sale of real estate, caused by his omissions to pursue the directory provisions of the statute, and the purchaser does not participate in such irregularities or illegalities, they will not invalidate the sale.

Layne v. Davidson, 11 Ky. Opin. 506.

The burden is on the purchaser at a commissioner's sale of real estate, where the validity of the sale is at issue, to show that the notices required to be posted prior to such sale were duly posted, and where he fails to show such posting his bid is properly rejected and the commissioner's sale set aside.

Zazio v. Samuels, 12 Ky. Opin. 148.

The purchasers at a judicial sale can not complain of a defective advertisement before the sale, since they were not injured by the fact that the advertisement was not more thorough and more extensive.

McKnight v. Jacob, 12 Ky. Opin. 218.

Where the purchaser of land at a commissioner's sale is satisfied with her title, an agent who has bought the land for her can not defeat the sale by showing irregularity in the proceedings.

Brown v. Bristow, 13 Ky. Opin. 909.

§ 38.—Mistake, surprise, or accident.

Where the court has ordered the sale of various tracts of real estate, designated by numbers, some of which were improved and valuable and others unimproved and less valuable, and by mistake in the sale and purchase thereof one buys what is supposed by the parties to be the valuable parcels for a high price and another buys at a low price what is supposed to be the unimproved parcel of land, while in truth by mistake the descriptions were erroneous, and the purchasers did not receive what they

bought, such error is one of fact, and may be corrected upon the supplemental petition of a purchaser filed in said cause.

Rudwig v. Crum, 8 Ky. Opin. 192.

When attorneys for plaintiff and defendant agree that a sale to be made by the sheriff shall not be made before August 15, but plaintiffs caused the sheriff to make sale on July 9, without any notice to the defendant, who does not attend the sale, and buys the property at an inadequate price, such sale will be set aside and the bid be rejected.

Youtsey v. Jones, 11 Ky. Opin. 830.

§ 39.—Inadequacy of price.

Where a judicial sale is regular in every way, and reported to the court, it is no ground for sustaining exceptions to it that the property did not bring as high a price as it would if again offered.

Pfingst v. Wilson, Exr., 8 Ky. Opin. 217.

A bidder interested in the sale who does not attend or bid can not complain that the property was sold at too low a price.

Pfingst v. Wilson, Exr., 8 Ky. Opin. 217.

Where a creditor allowed another to bid in the land of the debtor at the commissioner's sale, the creditor can not, by excepting to the commissioner's report of the sale, speculate on the purchaser's bargain, and have the land resold by offering a sum in excess of the purchaser's bid.

Bonta v. Vanarsdale's Admr., 7 Ky. Opin. 276.

The mere inadequacy of price is not cause for setting aside a judicial sale of real estate, when conducted in good faith where there is no proof showing unfairness or irregularity; but when inadequacy is coupled with the fact that no description of the land was given in the advertisement of sale, to enable bidders to know what they were buying and whether they are buying free of liens or not, a sale will be set aside.

Minton v. Beard, 8 Ky. Opin. 630.

The fact that after a judicial sale has been made, one may offer to bid

a higher price if the property be again offered, furnishes no ground for setting aside the sale made.

Montague v. Wolveston, 8 Ky. Opin. 659.

A sale by a commissioner will be set aside when the price bid is so grossly inadequate as to imply bad faith, or to indicate plain and palpable oppression.

Woolsey v. Dickey, 9 Ky. Opin. 334.

A judicial sale of real estate for less than one-tenth of its value imports such a wrong in the conduct of the sale that a court will refuse to approve it or will give relief against it to protect a wife whose interests have been thus sacrificed.

Bradshaw v. Christian, 9 Ky. Opin. 341.

Where the price of the sale of real estate is grossly inadequate, very slight circumstances will be seized upon by the chancellor for the purpose of granting relief against such a sale.

Johnson v. Rowe, 10 Ky. Opin. 682.

Where land sold at a judicial sale is in the adverse possession of others, and although worth about eight dollars per acre is sold for less than one dollar per acre, and the purchaser aided in procuring the judgment upon which the sale took place, such a sale will be set aside as against the purchaser and the plaintiff; but the chancellor should adjudge a lien on the land in favor of the purchaser for the purchase-money and amount of costs and expenses incurred in defending his title.

Chapman v. Bigger, 10 Ky. Opin. 708.

Mere inadequacy of price will not authorize a sale to be set aside unless it is so great as to import fraud.

Slaughter's Guardian v. Graham's Exr., 12 Ky. Opin. 317.

Where real estate worth several thousand dollars is sold on execution for \$397, and the record on appeal is so defective that the court is unable to ascertain whether the execution plaintiff, who purchased the land, was en-

titled to have execution, the sale will be set aside.

Morgan v. Stuart, 13 Ky. Opin. 888.

Where in a commissioner's sale of real estate the decree of the court is followed and neither fraud nor unfairness is shown, the sale will not be set aside at the instance of the owner because he may think the property did not bring a high enough price.

Haly v. Buckley, 13 Ky. Opin. 1005.

A judicial sale is not to be set aside on the ground of inadequacy of price alone, unless it be so gross as to import fraud.

Morton v. Morton, 13 Ky. Opin. 1064.

While land sold at judicial sale will not be set aside on account of the inadequate price received unless the price is so grossly inadequate as to import fraud, still if, added to an inadequate price, the officer in making the sale fails to follow the decree under which the sale is made and an injustice is done, such a sale will be set aside.

Morton v. Morton, 13 Ky. Opin. 1064.

§ 40.—Inadequacy of price in connection with other objections.

While inadequate consideration will not invalidate a sheriff's sale, when it is grossly inadequate, it will be considered by the chancellor in determining the question of fraud raised.

Spragins v. Russell, 11 Ky. Opin. 717.

§ 45. Actions to set aside.

A judicial sale of real estate will not be set aside because of an agreement between two or more persons to unite in the purchase, unless it is shown that such agreement was entered into with the fraudulent intention to stifle bidding and thereby obtain the property at a sacrifice.

Montague v. Wolveston, 8 Ky. Opin. 659.

§ 46. Resale on setting aside.

Where the court had directed the defendant's land to be sold and he was not presumed to know whether the chancellor would approve the sale or

not; and this placed him in such a position that he could do nothing but endeavor to obtain as much for his land as it was reasonably worth, and a purchaser could well doubt the validity of his title obtained under a purchase where the defendant's right to the land depended upon the future action of the court in rejecting or confirming the division, under such circumstances the chancellor should have ordered a resale, as he had a bid of 25 cents per acre in advance of the price bought at the first sale.

Waters v. Cardin, 5 Ky. Opin. 707.

The fact that the property did not sell for an amount sufficient to satisfy the prior lien does not prove that, upon a second sale, after the rights of all the parties shall have been adjudicated, and bidders can be assured that the title they are asked to take can never be disturbed, a larger amount may not be realized.

Hazelrigg v. Williams, 5 Ky. Opin. 353.

Where real estate is sold by the chancellor, and a lien is retained thereon to secure the payment of the purchase money, the chancellor can not order a resale of the property, where the bonds are not paid, without notice to the purchaser; and, while the bonds taken for the purchase money have the force of judgments, they are merely judgments in personam against the obligors and are not judgments to resell the land.

Nathan v. Jones, 9 Ky. Opin. 119.

Where land is sold under a decree of the court and the purchase-money is not paid, the chancellor has the power to order its resale for cash or on credit; and where the purchaser at the first sale is given notice and an opportunity to object to the order of resale and makes no objection he can not thereafter make any objection thereto.

Layne v. Loar, 11 Ky. Opin. 484.

When an interested party is misled by a notice of sale as to when the sale is to take place, and thus prevented from attending and bidding on the property to be sold, and the property is sold much below its value and

she excepts to the report of the sale and offers to pay four times the sum received at the sale for such property, a resale should be ordered; and after notice of the exception to be filed to such sale the first purchaser, if he makes improvement on the property, does so at his own risk.

Griffin v. Beadles' Admx., 11 Ky. Opin. 495.

§ 47. Collateral attack.

The failure to appoint an attorney for non-residents in a proceeding to sell real estate renders the judgment void, but where such attorney is appointed and acts the mere absence of a record showing that some of the devisees had been summoned is not sufficient to enable one to make a successful collateral attack upon the record.

Botto v. Botto, 13 Ky. Opin. 315.

A description in a judgment of sale of real estate which is imperfect or insufficient, will withstand a collateral attack.

McDyer v. Scaggs, 13 Ky. Opin. 597.

§ 48. Operation and effect in general.

The bond of the purchaser and the return of the officer that he has sold the property, and taken such bond completely discharged the judgment, and stands in lieu of it, and as between the creditor and debtors is a complete discharge while it remains in force.

Hughes' Admr. v. Craig, 5 Ky. Opin. 475.

Setting aside a conveyance of real estate on the application of creditors does not affect the rights of the parties to the conveyance, and they hold subject to the claims of creditors, as if no such judgment had been rendered.

Smith v. Hutchcraft, 10 Ky. Opin. 957.

§ 49. Title and rights of purchasers. § 50.—In general.

No title passes to the purchaser of land, at a decretal sale, where the legal titleholders are not parties to the suit.

Twyford, Hull & Coburn v. Hazelrigg's Admr., 1 Ky. Opin. 398.

It is not the duty of an officer selling land under judgment to satisfy an existing lien thereon, to disclose to the bidders any incumbrance existing other than that for which the sale is being conducted, in order that bidders might fully understand the character of title they would acquire if they purchased.

Underwood v. Bowles, 2 Ky. Opin. 321.

It is error to adjudge a sale of a defendant nonresident's property, where the allegations of the petition neither allege nor seek to point out the interest the defendant holds in the property, or where such title is not shown in the judgment.

Barney v. Halbert, 2 Ky. Opin. 629.

The promise by the purchaser of property, at a judicial sale, to restore same, if his money was returned, does not imply a promise to account for rents or hire for the time he has used the same.

Scott v. Scott, 3 Ky. Opin. 59.

As against creditors, the assignee's claim to the land does not depend alone upon proof of the fact that he was a purchaser from his fraudulent vendor, without notice of his fraudulent purpose, but upon evidence of the additional fact that he was a purchaser for a valuable consideration.

Dunn v. Conn, 3 Ky. Opin. 195.

Where land is sold at a judicial sale and purchased for the benefit of the execution debtor, he has no right to hold it against his creditors, after the purchaser has been reimbursed for money advanced on account of the purchaser.

McAfee's Exr. v. McKinney, 3 Ky. Opin. 426.

The costs and expenses of defending and prosecuting suits after the appellant purchased the land had no connection with the consideration of the sale bonds.

Letcher v. Tolle, 4 Ky. Opin. 337.

Where G purchased property at a judicial sale, subject to confirmation, and sold the land to D, who sold to

K for \$250 profit; and G's sale was not confirmed, but a resale ordered; and G died, and D bought it at the second sale for \$2,600; and D sued to recover his loss from G's estate; it was held, that as D had not made actual payment on the first purchase, he could not recover damages.

Dugan v. Gauman's Admr., 4 Ky. Opin. 117.

A covenant of warranty in a commissioner's deed, made in pursuance of a decree, binds the constituents and their heirs as effectually as if made by them in their proper person.

Campbell v. Flournoy, 4 Ky. Opin. 690.

A purchaser of land at decretal sale, pending the litigation, is bound to take notice of all that had been done, or might thereafter be done in the case.

Campbell v. Flournoy, 4 Ky. Opin. 690.

When a party purchases land at a judicial sale with the understanding that he is to hold it for another, he holds the land in trust for the benefit of the other.

Hagarty v. Scott, 4 Ky. Opin. 670.

A purchaser at a void judicial sale who has obtained the possession of the land, should be credited by all sums paid out for taxes, repairs and improvements, and charged with a fair rental value of the property looking to its condition at the time taken, and not its enhanced value by reason of the improvements.

Wile v. Sweeney & Taylor, 4 Ky. Opin. 278.

A purchaser at a void judicial sale has no right to interest on his purchase.

Wile v. Sweeney & Taylor, 4 Ky. Opin. 278.

Where land is sold under a judgment, and a deed of conveyance made, the purchaser, upon the discovery of the fact that some of the parties were not properly before the court, is entitled to indemnity against a partial

eviction by the holders of the unconveyed title.

Hawkins v. Hennig & Speed, 5 Ky. Opin. 533.

The sale under A's judgment to enforce his lien was an unconditional and absolute sale of land not incumbered, after the legal title passed to M, and consequently not embraced in the provisions of § 1, article 15, chapter 36, 1 R. S. 488, and that sale having been confirmed and a conveyance made to J for the land, his title to it was thereby perfected.

Jones v. Hopper, 5 Ky. Opin. 379.

Where only an undivided interest is sold as decretal sale, the charge for permanent improvements, made after the confirmation of the report, must be proportioned according to interest in the land.

Sanders' Heirs v. Sanders, 5 Ky. Opin. 287.

The purchaser at a decretal sale is entitled to pay for permanent improvements put on the land after the confirmation of the sale, to the extent that such improvements enhance the selling value of the land.

Sanders' Heirs v. Sanders, 5 Ky. Opin. 287.

Where one purchased land at judicial sale as trustee for another who was restrained from selling the land by the will of her mother, neither the judgment and confirmation of the sale, nor the purchase, will operate to move or affect such restriction on the power of sale.

Sanders v. Douglas, 5 Ky. Opin. 150.

A purchaser of land at sheriff's sale, with notice of a prior unrecorded mortgage, carries only an equity in the land subject to the prior equity of the mortgage.

Blankenship v. Bartleston & Co., 6 Ky. Opin. 158.

The purchaser of property at the sale of a commissioner of a chancery court is the equitable owner of the property, and an order of confirmation is a determination by the chancellor

that the purchaser's right had existed from the date of the sale.

Clasby v. Barnett, 6 Ky. Opin. 711.

Where an amended pleading asks for the sale of land omitted from the boundary by mistake, and the judgment directs the land to be sold, title to the whole tract passed to the purchaser.

Duff v. McEleveney, 6 Ky. Opin. 210.

Where land which was held in trust for a widow and her children was sold without making provision for the children, her lien on the land still subsists, and the purchaser takes subject thereto.

Hite v. Reeve, 6 Ky. Opin. 591.

In the sale of the equitable interest of a debtor in land, in which there is no defect of title, the land should be made subject to the payment of the purchase-money.

Hedrick v. Peters, 7 Ky. Opin. 565.

In buying platted property at a decretal sale, the purchaser must look to the town plat to determine what he is buying.

Darling v. Trustee of Carrollton, 7 Ky. Opin. 405.

In order for one to make out a title to land through a sheriff's deed, such person must show the execution and judgment on which it issued, or a bond of equal dignity of a judgment by judicial sanction.

Fortney v. Moore, 8 Ky. Opin. 288.

Judicial sales of real estate are made without warranty, and it is the duty of a purchaser at such sales to investigate the title before the sale is confirmed, and where he fails to do so, and it turns out that there are some unpaid taxes due, he must bear the consequences.

Wehrley v. Courtney, 8 Ky. Opin. 523.

The legal title to real estate does not pass to a purchaser at judicial sale and conveyance, where the holders of the legal title were not made parties in the case resulting in such judg-

ment and order of sale.

Sander's Assignee v. Duvall, 8 Ky. Opin. 642.

One who buys property at a commissioner's sale may resell the same to the original owners at any price that may be agreed upon, and where it is agreed that the purchasers from the buyers at commissioner's sale shall pay to him the price paid by him, and 25 per cent. interest for the time, such a contract is not for usurious interest, but is a consideration for the sale.

Wade v. Tucker, 9 Ky. Opin. 313.

One who buys real estate at judicial sale, where the court ordering such sale has jurisdiction of the subject-matter and of the parties, secures a good title.

Clemons v. Henry, 9 Ky. Opin. 457.

Where the judgment ordering the sale of real estate describes the land to be sold and does not attempt to declare the number of acres, the commissioner can not make it more specific by verbal representations at the time of sale; and the purchaser is bound to take notice of the judgment, and there is no warranty of the number of acres sold.

Jones v. Clutter, 9 Ky. Opin. 513.

A sale of property subject to an uncertain and unliquidated lien tends to the sacrifice of the property, and, where it is at all practicable, such sales ought to be made so as to pass to the purchaser a complete and unincumbered title.

Muhlhauser & Bro. v. Koch's Admx., 9 Ky. Opin. 531.

Where the court has jurisdiction of the parties and the subject-matter, the purchaser of land decreed to be sold acquires the title, however erroneous the judgment may be.

Wright v. Boyd, 10 Ky. Opin. 277.

A purchaser at a judicial sale of real estate not colluding with the plaintiff, and not a party to any fraud, and not having notice of any, is not

affected by the fraud of others in bringing about the sale.

Chapman v. Bigger, 10 Ky. Opin. 708.

The title of a purchaser of real estate at judicial sale is unaffected by an appeal from a judgment directing the sale and not from the order confirming it.

Earl v. Porter, 11 Ky. Opin. 85.

Where on an appeal from a judgment decreeing the sale of real estate the judgment is reversed, but, there being no supersedeas, the land was sold by the commissioner in conformity to the decree, before such reversal, the report of sale confirmed, and conveyance made without any exceptions being made, the purchaser takes a good title.

Rankin v. Eastin, 11 Ky. Opin. 173.

Where all the parties interested in real estate are before the court and the real estate is ordered sold to pay debts, the purchaser secures a good title, and a mere irregularity in the failure of the court to appoint a guardian ad litem and to file an answer for minor defendants, while it may be erroneous, will not affect the title of the purchaser whose purchase has been confirmed by the chancellor.

Browninski v. Phelps, 11 Ky. Opin. 207.

Even where there are some irregularities in a judicial sale of real estate, they will not affect the rights of the purchaser at such sale.

Weller v. Bissell, 11 Ky. Opin. 604.

The debtor may pay off his debt to his creditor, and notwithstanding this fact a stranger who buys the real estate of the debtor at judicial sale (which is confirmed) to satisfy the creditor's judgment, holds the property, and the fact of payment of the judgment by the debtor after sale will not affect the purchaser's title; but when the creditor, who is the plaintiff and the purchaser, accepts from the debtor payment in full of his debt, interest and costs, he thereby elects to

restore to his debtor what he has purchased at the sale.

Bickel v. Judah, 11 Ky. Opin. 612.

While in case the chancellor, having jurisdiction of the parties and the thing to be sold, sells, the title passes and the purchasers will hold; still when a creditor who becomes a purchaser accepts the full amount of his debt from the judgment debtor or her surety, he can not hold the money and the property both, and the acceptance by him of payment of his debt amounts to an agreement to restore the property at least in a court of equity.

Judah v. Bickel, 11 Ky. Opin. 914.

Purchasers at judicial sales take only such title as is obtained by confirmation of sale, but there is no warranty, and the rule of caveat emptor applies to the fullest extent, and there can be no relief without fraud or secret defect of title.

Henning v. Sweeney, 12 Ky. Opin. 132.

A purchaser acquires good title at a judicial sale, by the offer, the bid, its acceptance and confirmation, whether the steps up to the sale were regular or irregular.

Wrightson v. Cline, 12 Ky. Opin. 186.

Where real estate is sold at judicial sale, and the sale is confirmed, the purchaser can not complain on the grounds that the credit given him is for a longer period than authorized by law, and even if true his rights are not affected.

Wrightson v. Cline, 12 Ky. Opin. 186.

Where the court has jurisdiction of the person and subject of the action, the title acquired by the purchase of real estate ordered sold in such action is good.

Buchanan v. The Crucible Steel Casting & Metal Co., 12 Ky. Opin. 206.

Where a conveyance of real estate states that the grantor "doth grant, bargain, sell and convey to (a named person) and to such child or children

she may have by the said grantor at the time of death, or to the descendants of any such, if descendants there should be," in a suit by the grantor (husband) against the grantee (wife), for reinvestment of the proceeds, a child of the wife has no present or vested interest, and is not a necessary party to such proceeding; and a title secured at such a sale for reinvestment under the Act of 1862, *Myers' Sup.*, § 426, is good.

Wilson v. Graham, 12 Ky. Opin. 623.

One who buys at a judicial sale, but before buying is informed that the widow asserts a homestead right in the property, takes the property subject to the widow's claim.

Funk v. Walters, 12 Ky. Opin. 761.

Where the judgment creditor who has become the purchaser of real estate sold on his judgment, and received a conveyance thereof, and the judgment debtor enters into a contract by which they agree that the debtor may redeem such land, and a part of the price agreed upon is paid and a promise accepted for the balance, the creditor is not entitled to a judgment giving him the possession and the land on account of the failure in payment, but is entitled to have the land sold to pay such balance.

Layne v. Weddington, 13 Ky. Opin. 264.

The rights of an innocent purchaser of real estate at a judicial sale cannot be defeated by entering into an investigation of the authority of one's attorney to act, where the record shows that the attorney instituted the action and the parties under it obtained their money; and if parties have been injured by the fraudulent conduct of an attorney the remedy is against the one practicing the fraud and not against the innocent purchaser for full value.

Botto v. Botto, 13 Ky. Opin. 315.

It is the policy and requirement of the law that judicial sales of real estate shall not be made unless the legal title will thereby pass, and where the legal title to land is in heirs it can not be conveyed at a judi-

cial sale resulting and ordered in a proceeding to which they are not parties.

Kelso v. Story, 13 Ky. Opin. 422.

There is no warranty in judicial sales; the purchaser takes what he gets and he must protect himself by examining such title before purchasing.

Fearons v. Gallagher's Heirs, 13 Ky. Opin. 668.

§ 51.—Possession.

It is error to order a commissioner to place a purchaser in possession at the time of a decretal sale, and especially where the sale occurs after the crop is gathered.

Lane v. Roberson, 1 Ky. Opin. 520.

A person who buys in the land of another at a judicial sale, and prevents creditors from redeeming it by agreeing to sell enough of the land to repay himself and then turn the balance of it over to the other creditors, can not be permitted to hold all of the land and thus defeat the claims of the other creditors; but equity will decree a resale of the land to satisfy the claims of creditors after the first purchaser has been repaid.

Robinson v. Motley, 10 Ky. Opin. 64.

The purchaser of land at a judicial sale is entitled to possession after the confirmation of the sale, and an occupant and part owner of the land sold to pay debts and costs can not legally be permitted to occupy and enjoy the land free of rent after the sale and its confirmation.

Breckenridge v. Carrico, 11 Ky. Opin. 405.

§ 53.—Defects or irregularities in judgment, decree, order or sale.

It is the better practice for the court to direct the time and place of sales of real estate ordered by it; still the mere omission to direct when the land should be sold is not a reversible error.

Berry v. Berry, 9 Ky. Opin. 598.

§ 54.—Modification, vacation, or reversal of judgment, decree, or order.

Where a judgment for the sale of real estate fails to describe the land

adjudged to be sold, such judgment will be reversed.

Logsdon v. Woodard, 9 Ky. Opin. 375.

The fact that a judgment under which land has been sold is afterward reversed will not affect the title of a purchaser at such sale.

Hollis v. Owensboro Sav. Bank, 10 Ky. Opin. 495.

It is held that a sale fully executed by a court of competent jurisdiction will be upheld, although the judgment under which it was made be subsequently reversed as erroneous, and this is true whether the plaintiff in the judgment or a stranger be the purchaser.

Scott v. Estill, 13 Ky. Opin. 568.

The purchaser of land at a judicial sale is not affected by the reversal of the judgment under which the sale is made.

Cooley v. Rea's Admr., 13 Ky. Opin. 682.

§ 55.—Opening or vacation of sale.

Where a purchaser of land at judicial sale is insolvent, it is the duty of the judgment plaintiff to have the sale set aside, or take such steps as would secure him the purchase-money.

Gray v. Cromwell, 7 Ky. Opin. 151.

§ 56. Liabilities of purchasers.

Where one bids at a judicial sale of real estate, but fails to give bond and pay for the land, and the commissioner does not report the bid and sale, but resells the same to another bidder for a less price, which sale is reported and confirmed, no recovery can be had from the first bidder for the difference between his bid and the second bid.

Hines v. Brummell, 9 Ky. Opin. 764.

Before a purchaser at a commissioner's sale should be held liable on his bid, the court should, by rule or otherwise, notify him to comply with the terms of his purchase, and this should be done before the court confirms a sale of the same property to another.

Hines v. Brummell, 9 Ky. Opin. 764.

Where a commissioner sells real estate, the destruction of a building upon it before confirmation of the deed does not release the purchaser from liability, for where the judgment directed the property sold it belonged to the appellant from the date of his purchase.

Walters v. Blevins' Exr., 11 Ky. Opin. 309.

§ 57. Assignees of certificates of sale.

Where a purchaser at a judicial sale assigns his bid to another, the contract is fully performed upon the execution of the conveyance by the commissioner to the assignee.

Hanley v. Whipps, 5 Ky. Opin. 366.

§ 59. Redemption.

Where a party purchases land at a decretal sale, agreeing that the mortgagor shall have the right to redeem, and later transferred his claim to the purchase to a third party, in an action by the latter to foreclose, the heirs of the original purchaser must be made parties, and a transfer to a third party does not pass title.

Florence v. Troutman's Admr., 4 Ky. Opin. 389.

The owner of land sold on decree may redeem it from sale within a year, but where the purchaser at such a sale for a consideration agrees to give the owner a longer time and breaks the agreement and procures a deed from the sheriff, the owner may set such deed aside and be allowed to redeem within the time agreed upon between the parties.

McManama v. Campbell, 8 Ky. Opin. 586.

Where a debt, including interest and costs, is paid by the conveyance of real estate, an agreement of the purchaser thereafter to permit the grantor to redeem is a voluntary agreement based on no other consideration than his desire that the grantor should keep the land and pay the money, which the grantor agreed to do; and when he makes payments under such agreement, and fails to pay the whole of the debt, the creditor

may take possession or enforce his judgment by again selling the land.

Kueborth v. Mead, 11 Ky. Opin. 408.

Where by agreement the owner of land has the right to redeem it from sale within a given time, and he thereafter has the money and offers to redeem by paying the amount due, and is not allowed to do so because more is demanded, such owner may force his right to redeem.

Bramel v. Burden, 13 Ky. Opin. 477.

Where debts, for the satisfaction of which property is adjudged to be sold, were created before the passage of the Act of April 9, 1878, "for the redemption of real estate, sold under order or judgment of a court," the owner is not entitled to the right of redemption, though the property may have been sold for less than two-thirds of its value.

Movar v. Crawley, 13 Ky. Opin. 733.

Where a party has no right to redeem real estate after sale, it is not error to order a writ of possession to issue in favor of the purchaser before the expiration of twelve months from the day of sale.

Movar v. Crawley, 13 Ky. Opin. 733.

§ 61. Conveyance to purchaser.

In case the court, in a cause to sell real estate, has jurisdiction of the parties who own the estate, and of the subject-matter, the deed made by a commissioner appointed by the court to convey the real estate will effectually pass the title.

Gill v. Light, 12 Ky. Opin. 614.

When one buys land in his own name at commissioner's sale, as agent for another, upon showing such agency, the principal may force the deed to be executed to her.

Brown v. Bristow, 13 Ky. Opin. 909.

§ 62. Proceeds.

The proceeds of a judicial sale can

not be diverted from its adjudged destination.

Flournoy v. Morris, 5 Ky. Opin. 47.

The principle that where a tract of land is directed to be sold and proceeds divided between a multiplicity of persons, none are entitled to a reconversion, without the unanimous consent of the whole, has no application to a case, where only an undivided moiety was to be converted.

Thornton v. Hodge, 3 Ky. Opin. 101.

Where the proceeds of a judicial sale are improperly applied, the remedy is to apply to the court for a proper application and not by excepting to the sale.

Jennings v. Quantis' Exr., 4 Ky. Opin. 626.

Although the title to property sold under a fieri facias be absolutely worthless, yet the right of the plaintiff to the money is not impaired thereby.

Hughes' Admr. v. Craig, 5 Ky. Opin. 475.

In view of the fact that the court's commissioner was the trustee selected by the debtor to sell his estate and apply the proceeds to the payment of his debts, it was not improper that he should be entrusted with the duty of setting apart to the heirs and distributees of the debtor such property as was exempt from execution, nor that he should be permitted to make a division of the land.

Jones v. Robinson, 5 Ky. Opin. 371.

Where a judgment is entered for the sale of bank stock to pay claims held by the bank, and the sum derived from the sale is not sufficient to pay all of such claims, and the judgment does not designate where the credits are to be placed by the bank, such credits must be applied pro rata on all such claims as were set up in the petition upon which judgment was rendered.

Bank of Louisville v. Atwood's Admr, 9 Ky. Opin. 122.

§ 63. Fees and expenses.

Pursuant to Gen. Stat., chap. 75, § 14, the allowance to a commissioner for making sales of land can not exceed ten dollars per tract.

Fox v. Apperson & Reid, 8 Ky. Opin. 233.

JURISDICTION.

See Perjury, § 9.

Action of ejectment, see Ejectment, § 36.

Amount in controversy, see Appeal, §§ 47, 49, 55; Courts, §§ 119, 167.

Appellate jurisdiction, see Appeal, II. Concurrent and conflicting jurisdiction, see Courts, VIII.

Courts of appellate jurisdiction, see Courts, VI.

Courts of general jurisdiction, see Courts, III.

Courts of limited or inferior jurisdiction, see Courts, IV.

Effect of set-off and counterclaim on amount in controversy, see Appeal, § 51.

Exclusive jurisdiction of circuit courts, see Courts, § 183.

In action by assignee of note, see Assignments, § 127.

In criminal cases, see Criminal Law, IV.

Limited jurisdiction, see Criminal Law, § 102.

Not matter of agreement of parties, see Courts, § 22.

Of actions involving real estate, see Courts, §§ 3, 18.

Of appellate court on appeal from county court, see Appeal, § 24.

Of circuit court, see Courts, § 3.

Of condemnation proceedings, see Eminent Domain, § 172.

Of court commissioner, see Court Commissioners, § 4.

Of Court of Appeals—Amount in controversy, see Appeal, §§ 45, 46, 49.

Of courts of equity, see Equity, § 3.

Of garnishee, see Garnishment, § 76.

Of non-residents of county, see Courts, § 10.

Of offense of passing counterfeit

notes on national bank, see Counterfeiting, § 14.

Of state court over insolvent debtor, see Assignments for Benefit of Creditors, § 274.

Of state court over trustee in bankruptcy, see Bankruptcy, § 295.
 Of suits for divorce, see Divorce, § 58.
 Of suits in equity, see Equity, §§ 1, 3.
 Of trial court as affecting right on appeal, see Appeal, § 20.
 Over deceased's estate, see Executors and Administrators, § 435.
 Over suit by taxpayer for reimbursement for taxes paid, see Courts, § 182.
 Prosecution for gaming, see Gaming, § 82.
 Reduction of judgment by remission or amendment, see Appeal, § 62.
 Restraining grantee from selling land, see Injunction, § 110.
 Shown by record, see Appeal, § 493.
 Suits for divorce, see Divorce, IV.
 Termination of, see Criminal Law, § 240.
 Transfer of cause by agreement from quarterly to circuit court, see Courts, § 22.
 Transfer of cause from county court to circuit court by agreement of parties, see Courts, § 26.
 Waiver of right to object to, see Appeal, § 20.

JURY.

II. RIGHT TO TRIAL BY JURY.

§ 12. Nature of cause of action or issue in general.

§ 13. Legal or equitable actions or issues.

§ 27. Waiver of right.

IV. SUMMONING, ATTENDANCE, DISCHARGE, AND COMPENSATION.

§ 77. Compensation of jurors.

V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

§ 90. Relationship to party or person interested.

§ 98. Formation and expression of opinion as to cause.

§ 99.—In general.

§ 124. Challenges for cause.

§ 127.—Time.

§ 134. Peremptory challenges.

§ 136.—Number.

VI. IMPANELING FOR TRIAL AND OATH.

§ 148. Oath.

See Grand Jury.

Custody, conduct and deliberations of jury, see Trial, VIII.

Discharge of jury without verdict, see Criminal Law, § 181.

Lodging jury in hotel, see Trial, § 302.

Misconduct of, see Trial, § 304.

Separation of, see Appeal, § 1069; Trial, § 303.

Separation of jury during trial of capital case, see Criminal Law, § 854.

Submission of issue of fact in equitable action, see Equity, § 376.

View by jury, see Trial, § 28.

II. RIGHT TO TRIAL BY JURY.

§ 12. Nature of cause of action or issue in general.

If there be no issue of fact presented in proceedings, by ordinary, there can be no trial by jury, except where there is an allegation of value or damages claimed.

Shane v. Dixon, 3 Ky. Opin. 71.

§ 13. Legal or equitable actions or issues.

By consenting to the transfer of an ordinary action to a court of equity, one does not thereby waive his right to a jury trial as to controverted facts, but he is entitled to have the legal issue tried by a jury.

Betz v. Newport Provision Mart Assn., 12 Ky. Opin. 689.

§ 27. Waiver of right.

The parties to an action arising on contract may waive a trial by jury, and in other actions than those arising on contract, or in actions not arising on contracts, a jury may be waived, with the assent of the court, by the failure of the party to appear at the trial.

Shane v. Dixon, 3 Ky. Opin. 71.

IV. SUMMONING, ATTENDANCE, DISCHARGE, AND COMPENSATION.

§ 77. Compensation of jurors.

One called from the bystanders to serve on the jury, and who is not a member of the regular panel is not entitled to compensation unless he serves more than one day.

Godshaw v. Roberts, 10 Ky. Opin. 483.

V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

§ 90. Relationship to party or person interested.

In a trial to establish a lost will, a challenge of a juror should be sustained where it is shown that the juror's mother was a cousin of the testator and also related to both parties to the suit.

Aulick v. Fishback, 8 Ky. Opin. 457.

§ 98. Formation and expression of opinion as to cause.

§ 99.—In general.

Where, after a conviction in a criminal case, affidavits are filed showing that a juror, who stated upon voir dire that he had neither formed nor expressed any opinion as to the merits of the cause, had in fact expressed an opinion that the accused was guilty, raises an issue for the decision of the trial court, and this decision is final thereon.

Pulliam v. Commonwealth, 13 Ky. Opin. 9.

Jurors are not incompetent to try a criminal case where it is shown only that they have expressed an opinion to the effect that if the facts they have heard were true the accused ought to be hung.

Fowler v. Commonwealth, 13 Ky. Opin. 853.

§ 124. Challenges for cause.

§ 127.—Time.

Under the code, each party in a murder trial is entitled to a full panel of jurors found upon examination qualified to try the case, before being required to exercise the right of challenge to the individual juror, and when the number is lessened by successful challenge of either party, the panel must again be filled before being passed on, and so on until the jury is completed.

Edrington v. Commonwealth, 13 Ky. Opin. 792.

§ 134. Peremptory challenges.

§ 136.—Number.

One charged with keeping a bawdy

house is entitled to challenge only three jurors peremptorily.

Burton v. Commonwealth, 11 Ky. Opin. 841.

VI. IMPANELING FOR TRIAL AND OATH.

§ 148. Oath.

The fact that the jury was sworn to assess damages instead of to try the issue, was held immaterial.

Louisville, C. & L. R. Co. v. Hampton's Exr., 7 Ky. Opin. 296.

JUSTICES OF THE PEACE.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 2. Creation and abolition of office.

IV. PROCEDURE IN CIVIL CASES.

§ 78. Process.

§ 80.—Issuance, form, and requisites.

§ 85. Arrest and bail.

§ 89. Pleading.

§ 91.—Declaration, complaint, petition, or statement of demand.

§ 118. Judgment.

§ 135. Execution.

V. REVIEW OF PROCEEDINGS.

(A) APPEAL.

§ 141. Appellate jurisdiction.

§ 153. Requisites and proceedings for transfer of cause.

§ 157.—Certificate or affidavit.

§ 159.—Bonds or other securities.

§ 160.—Process or notice of appeal.

§ 166. Dismissal, withdrawal, or abandonment.

§ 170. Trial of cause anew.

Amendment of judgment of, see Appeal, § 885.

Levy on and sale of pawned goods, see Pawnbrokers, § 5.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 2. Creation and abolition of office.

The legislature has an unlimited right to regulate the jurisdiction of justices of the peace, but can not

abolish such office, but it may legally provide that their compensation for such services as may be performed shall be a salary instead of fees.

Stephens v. Williamson, 12 Ky. Opin. 129.

IV. PROCEDURE IN CIVIL CASES.

§ 78. Process.

§ 80.—Issuance, form, and requisites.

A summons or warrant is sufficient in such court if it commands the officer to summon the accused to appear in court on a named day, to answer the charge of having committed the offense, briefly describing the character of the offense, the object being to get the party accused before the court when he has violated the law.

Wade v. Commonwealth, 11 Ky. Opin. 356.

§ 85. Arrest and bail.

A motion for discharge from a capias, though irregular and informal, is sufficient to give the court jurisdiction, especially where the plaintiff attended by his counsel at the time the motion was heard, and no objection was made as to such proceeding.

Bryant v. Crittenden, 10 Ky. Opin. 605.

§ 89. Pleading.

§ 91.—Declaration, complaint, petition, or statement of demand.

The same strictures of pleading is not required in a justice court as in the circuit court.

Wade v. Commonwealth, 11 Ky. Opin. 356.

§ 118. Judgment.

Under § 719, Civ. Code, providing that the bond of the claimant should be returned to the justice of the peace if the execution issued from such a court, the justice can only give judgment for the amount of each execution and 10 per cent. interest thereon, and it is the amount of the execution that gives jurisdiction and not the value of the property.

Hawkins v. Dean, 6 Ky. Opin. 511.

§ 135. Execution.

Where an appeal in a civil suit is erroneously taken from a justice of the peace to the quarterly court, and such court has no jurisdiction of the cause but renders a judgment for the plaintiff, neither the failure of the defendant to object, nor even the consent of both parties, could give the court authority to enter a judgment, and execution on such a void judgment may be enjoined.

Monterey & New Columbus Tpk. Co. v. Davis, 11 Ky. Opin. 336.

V. REVIEW OF PROCEEDINGS.

(A) APPEAL.

§ 141. Appellate jurisdiction.

Where the amount sought to be recovered in a justice court is only \$11.60 the circuit court has no jurisdiction to entertain an appeal.

Routt's Admr. v. Berry, 8 Ky. Opin. 420.

§ 153. Requisites and proceedings for transfer of cause.

§ 157.—Certificate or affidavit.

It is not required in taking an appeal to the circuit court from the county court that appellant shall file the original papers with the clerk, and copies of the orders of the county court.

Spears v. Taylor, 9 Ky. Opin. 203.

§ 159.—Bonds or other securities.

It is necessary, in taking an appeal to the circuit court from the county court, to file a certified copy of the judgment and amount of costs, and cause the proper appeal bond to be executed, and thereupon the clerk will issue an order to the lower court to stay proceedings and to transmit to the clerk's office all the original papers in the case.

Spears v. Taylor, 9 Ky. Opin. 203.

§ 160.—Process or notice of appeal.

A defendant in a suit for forcible detainer, who has appeared and defended in the justice court, can not in the circuit court take advantage for want of proper service of the writ.

Bailey v. Lykins, 8 Ky. Opin. 205.

§ 166. Dismissal, withdrawal, or abandonment.

The fact that there is no bill of exceptions filed affords no grounds for the dismissal of an appeal taken to the circuit court.

Ott v. Graves, 9 Ky. Opin. 86.

§ 170. Trial of cause anew.

On an appeal to the circuit court, the action should be tried anew and the defendant should be allowed to put in any sufficient defense, as if the suit had been brought originally in that court.

Graves v. Brown, 3 Ky. Opin. 417.

JUSTIFICATION.

For homicide, see Homicide, § 151.

KNOWLEDGE.

By grantee of insolvency and indebtedness of grantor, see Fraudulent Conveyances, § 156.

LABORERS' LIENS.

See Mechanics' Liens.

LACHES.

See Equity, II; Husband and Wife, § 149; Limitation of Actions; Mortgages, § 425; Trusts, § 292.

Gross laches in proceedings for new trial, see New Trial, § 115.

Negligence in bringing action on note, see Limitation of Actions, § 25.

Of administrator resulting in loss of assets, see Executors and Administrators, § 118.

Presentation of claims, see Assignments for Benefits of Creditors, § 300.

LANDS.

See Public Lands; Real Property.

LANDLORD AND TENANT.**I. CREATION AND EXISTENCE OF THE RELATION.**

§ 1. Nature of the relation.

§ 6. Implied tenancy.

§ 9.—Vendor and purchaser.

§ 15. Attornment.

§ 16. Disclaimer or disavowal of relation.

§ 18. Evidence as to relation.

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§ 26. Recording lease or contract.

(B) CONSTRUCTION AND OPERATION.

§ 40. Construing instruments together.

§ 46. Time as of the essence of the contract.

§ 49. Liability of lessee for breach of contract.

III. LANDLORD'S TITLE AND REVERSION.**(A) RIGHTS AND POWERS OF LANDLORD.**

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§ 52. Nature of reversion.

§ 55. Injuries to reversion.

§ 58. Conveyance to tenant.

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(B) ESTOPPEL OF TENANT.

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§ 72. Duration of term.

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§ 150. Right and duty to make repairs in general.

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§ 157. Improvements by tenant and covenants therefor.

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(E) INJURIES FROM DANGEROUS OR DEFECTIVE CONDITIONS.

§ 164. Injuries to tenants or occupants.

§ 166. Injuries to property of tenant on premises.

(F) EVICTION.

§ 172. Act or omission of landlord.

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§ 181. Nature of rent.

§ 182. Covenants and agreements to pay rent.

§ 184. Deposits and other security by tenant.

§ 186. Disturbance of possession of tenant.

§ 193. Cancellation of lease.

§ 196. Holding over after expiration of term.

§ 200. Amount and installments.

§ 203. Persons entitled.

§ 204.—In general.

§ 206. Persons liable.

§ 207.—In general.

§ 208.—Transfer of lease or agreement.

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(B) ACTIONS.

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§ 223. Set-off and counterclaim.

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§ 239. Nature of landlord's lien.

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§ 246. Subject-matter to which lien attaches.

§ 248. Priorities.

§ 249. Rights and remedies of creditors of tenant.

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§ 252. Rights and liabilities of purchasers of property.

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§ 264. Statutory provisions.

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§ 266. Defenses and ground of opposition.

§ 269. Property subject to distress.

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IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

§ 277. Re-entry.

§ 279. Action for recovery of possession.

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X. RENTING ON SHARES.

§ 322. Construction and operation of contracts in general.

§ 325. Rights and liabilities as to land.

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§ 328. Liens on crops.

§ 331. Actions between parties.

See Covenants; Judgment, § 800; Use and Occupation.

Buildings erected on premises by agent, see Property, § 3.

Champerty as between landlord and tenant, see Champerty and Maintenance, § 3.

Covenants running with land, see Covenants, § 53.

Estate for years inferior to life estate and estate of inheritance, see Estates, § 1.

Fixtures as between landlord and tenant, see Fixtures, § 15.

Leasehold interest subject to execution, see Execution, § 34.

Leases required to be in writing, see Frauds, Statute of, § 57.

Liability for failure to levy distress warrant, see Sheriffs and Constables, § 106.

Lien on rents, see Attachment, § 184.

Mining leases, see Mines and Minerals, II, C.

Nature of mining lease, see Mines and Minerals, § 56.

Railroad lease, see Railroads, § 259.

Rents from lease of wife's separate property, see Husband and Wife, § 125; Mortgages, § 547.

Right to rents accruing on estate of deceased, see Descent and Distribution, § 52.

Trespass in execution of distress warrant, see Trespass, § 9.

I. CREATION AND EXISTENCE OF THE RELATION.

§ 1. Nature of the relation.

The relation of landlord and tenant does not exist, where it is shown that no contract was entered into, no rents paid, and no connection at all with the alleged landlord, other than the making a sale of title absolute.

Myres & Slater v. Sowards, 4 Ky. Opin. 113.

§ 6. Implied tenancy.

§ 9.—Vendor and purchaser.

Where defendants are in possession of land as purchasers under an oral contract which they could not enforce, they were not entitled to notice to quit, since they can be dispossessed only upon a rescission of the contract of sale.

Farmer v. Sanders, 9 Ky. Opin. 604.

No contract to pay rent can be presumed nor implied where one merely remains in possession of premises which he has sold, and nothing is shown to prove that the relation of landlord and tenant had ever existed between the parties.

Henzog v. Neimeger's Assignee, 9 Ky. Opin. 706.

§ 15. Attornment.

The acceptance of rent in pursuance of a lease is not only a waiver of rights as innocent purchasers without notice, but is an acceptance of the tenant as the tenant of the purchaser according to the terms and conditions of the lease existing between the tenant and his former landlord.

Payson & Lyon v. Holden, 11 Ky. Opin. 771.

§ 16. Disclaimer or disavowal of relation.

Where appellant entered upon the possession of the premises as tenant

of appellee, and for some time paid him rent for the same at an agreed rate per month, the burden is on her to establish that she had changed her relation as tenant to that of purchaser.

Williams v. Daley, 5 Ky. Opin. 344.

§ 18. Evidence as to relation.

Where appellant, as tenant to one H, through his agent, had been in possession of land for about twenty years, which possession had never been surrendered to appellees claiming same, but though at one time he seemed to conclude to rent of appellee or surrender the place, he afterward declined to either rent, surrender or vacate the premises, but did agree to give appellee one-half of the growing apple crop, which he did more for the purpose of an equitable settlement rather than an acknowledgment of tenancy; this state facts does not establish the relation of landlord and tenant, and does not justify a suit of forcible entry and detainer.

Doss v. Hannon, 1 Ky. Opin. 601.

II. LEASES AND AGREEMENTS IN GENERAL.

(A) REQUISITES AND VALIDITY.

§ 26. Recording lease or contract.

A lease recorded in the bond and power of attorney book, where sales of personal property or mortgages of personal property are recorded, is not notice to a purchaser of the leased premises without actual knowledge of the lease.

Henry v. Louisville Rolling Mill Co., 7 Ky. Opin. 295.

Where a lease has been lodged for record in the proper office, and the taxes paid, it will, for the purpose of constructive notice, be treated as recorded.

Lindenberger v. Hurlburt, 2 Ky. Opin. 175.

(B) CONSTRUCTION AND OPERATION.

§ 40. Construing instruments together.

Where there are two papers exe-

cuted by the same parties, at the same time upon the same subject, they must be construed as one contract.

Kentucky Improvement Co. v. Barr, 8 Ky. Opin. 30.

§ 46. Time as of the essence of the contract.

Where a tenant agrees to take the store room of his landlord subject to a contract between the landlord and a person who was engaged in making improvements thereon, he is not entitled to possession before the contractor completes the improvements unless the delay is the result of unreasonable interference by the landlord, and the landlord is not entitled to collect any rent until possession is given to the tenant.

Turner v. Martin, 8 Ky. Opin. 158.

§ 49. Liability of lessee for breach of contract.

A lessor may waive a breach of condition of the lease on the part of the lessees and the lessees have no right to require the lessor to take advantage of the breach.

Lair v. Reynolds, 7 Ky. Opin. 182.

III. LANDLORD'S TITLE AND REVERSION.

(A) RIGHTS AND POWERS OF LANDLORD.

§ 50. Title and possession to sustain lease.

The removal of a tenant does not vacate the premises, as the possession, by operation of law, devolves on the landlord.

Garrett v. Phillips, 5 Ky. Opin. 622.

§ 62. Nature of reversion.

Upon the termination of a lease and the removal from the premises by the tenant, the possession reverts to the landlord.

Crawford v. James, 3 Ky. Opin. 587.

§ 55. Injuries to reversion.

A lease containing a provision that the lessee shall "keep \$2,000 insured on the premises for the exclusive benefit of the lessor, during its continuance," means that \$2,000 was the

amount of improvements kept on the premises by the landlord, and the tenant, in a final settlement, should account therefor.

Kaye v. Duncan, 3 Ky. Opin. 563.

§ 58. Conveyance to tenant.

§ 60.—Merger.

Where a tenant holding a lease during the term becomes the purchaser of the real estate, his leasehold interest merges in his fee simple title and the relation of landlord and tenant ceases to exist.

Vaughan's Guardian v. Burkhart, 8 Ky. Opin. 516.

(B) ESTOPPEL OF TENANT.

§ 63. Operation of estoppel against tenant.

Where the petition alleges that possession had been frequently demanded and refused, and it appears that appellant disowned his tenancy and claimed against the appellees before the institution of suit, such hostile claim exonerated the appellees from the necessity of giving him notice.

French v. French's Heirs, 5 Ky. Opin. 666.

Tenant can not deny title under which he enters, if the lease covered the land in controversy; and where the lessee became tenant of the lessor, he can not deny the title under which he holds without an adverse possession of fifteen years.

Smith v. Seaton, 1 Ky. Opin. 494.

A tenant can not dispute his landlord's title.

Ricks v. O'Neill, 2 Ky. Opin. 219.

Where it does not appear that R entered as subtenant under W, or knowing that his predecessor was W's tenant, R is not estopped to acquire the legal title.

Wiseman v. Rainey, 2 Ky. Opin. 108.

Where improvements are made by a tenant who sells out to another, the purchaser succeeds only to the rights of the tenant, and can not claim possession and ownership by adverse possession as against the lessor.

Hanson v. Lea, 8 Ky. Opin. 162.

While a tenant owes strict fidelity to the landlord, he is not estopped from denying his landlord's title where the lease is procured by fraud by the landlord and in fact the tenant owns the property.

Craddock v. Ewin, 13 Ky. Opin. 26.

§ 66. Adverse possession of tenant.

Where appellee entered upon the land in controversy, with her husband, under a lease from appellant, she is estopped to claim possession adverse to appellant.

Reeder v. Bell, 5 Ky. Opin. 399.

IV. TERMS FOR YEARS.

(A) NATURE AND EXTENT.

§ 72. Duration of term.

Where a tenant has a written lease on the wife's real estate executed by the husband and wife, he may legally hold the estate against the lessor and his vendee; and such tenant under such circumstances can hold the estate against one who inherits it before the expiration of the lease.

Vaughan's Guardian v. Burkhart, 8 Ky. Opin. 516.

(B) ASSIGNMENT, SUBLETTING, AND MORTGAGE.

§ 75. Right of lessee or tenant to assign or sublet in general.

By consenting that his tenant may sub-lease the premises, the landlord does not release his tenant from liability or accept the sub-lessee as his tenant.

Brown v. Schuler, 8 Ky. Opin. 311.

§ 79. Construction and operation of assignments in general.

In the absence of a contract on the part of the assignor of a lease to be responsible for the title of the lessor, or to keep the assignee in possession of the premises during the continuance of the lease, no obligation on his part can be implied from the assignment of the lease.

Hackett v. Schad, 5 Ky. Opin. 538.

The only undertaking which the law will imply from the assignment of a lease is that the assignor shall be re-

sponsible for the ability of the lessor and his representatives to respond in damage in case of eviction.

Hackett v. Schad, 5 Ky. Opin. 538.

Where both the purchaser of land and the assignee of the lease thereon were informed of the circumstances attending the conveyance and the lease thereof, the court should not adjudge the purchaser the possession of the land until the expiration of the lease.

Redmon v. McGhee, 5 Ky. Opin. 427.

(D) TERMINATION.

§ 94. Notice.

Where the only evidence of notice of intention to quit the premises, is that defendant told a neighbor that he intended to abandon the premises, it is not sufficient notice to the landlord of intention to quit as will bar the right to double rent.

Robards v. Mason, 7 Ky. Opin. 285.

§ 110. Abandonment.

A delay in executing a writ of possession is a mere favor extended to the defendant, and is not an abandonment of a right to enforce the judgment.

Gose v. McDonald, 9 Ky. Opin. 744.

V. TENANCIES FROM YEAR TO YEAR AND MONTH TO MONTH.

§ 116. Termination.

A tenant from year to year can not abandon the premises on a few days' notice of his intention to do so, without the consent of the landlord.

Hall's Safe & Lock Co. v. Meade, 6 Ky. Opin. 219.

VI. TENANCIES AT WILL AND AT SUFFERANCE.

§ 117. Nature and incidents of tenancy.

Where the term of a lease is for a long period the mere fact that the lessee may terminate it sooner does not make him a tenant at will or by sufferance.

Pearcy v. Heath, 10 Ky. Opin. 862.

§ 118. Creation of tenancy at will.

The fact that rent is payable by the month is not of itself sufficient to

show that there was an agreement, either express or implied, that defendants were to hold the premises at will.

Bonnor v. Johnson's Trustees, 6 Ky. Opin. 13.

VII. PREMISES, AND ENJOYMENT AND USE THEREOF.

(B) POSSESSION, ENJOYMENT, AND USE.

§ 128. Delivery of possession.

A lessor can not be permitted to obtain an advantage by reason of his own wrong in not surrendering possession of leased premises to his lessee, when he has agreed to do so.

Owens v. Smith, 8 Ky. Opin. 109.

§ 130. Covenants for quiet enjoyment.

A suit can not be maintained by a tenant against his landlord on a covenant of quiet enjoyment where a stranger has trespassed on the premises, unless it is alleged that he was the active agency in the wrong.

Campbell v. Maupin, 5 Ky. Opin. 250.

§ 131. Disturbance of possession of tenant.

The rights of a landlord whose lien is in full force, and who has not resorted to his legal remedies to enforce the collection of his rent, can not be jeopardized by the seizure and sale of the tenant's property under execution.

Burford's Admr. v. Gaither, 5 Ky. Opin. 52.

(C) INCUMBRANCES, TAXES, AND ASSESSMENTS.

§ 149. Liabilities for taxes and assessments.

A lessee of property in perpetuity can not be held liable for taxes assessed on the value of the lot, as the owner thereof, but will not be subrogated to the liability of the lessor.

Wilgus v. Commonwealth, 3 Ky. Opin. 448.

(D) REPAIRS, INSURANCE, AND IMPROVEMENTS.

§ 150. Right and duty to make repairs in general.

A tenant, under covenant to keep leased premises in repair, is not bound thereby to replace buildings accidentally destroyed by fire; and it follows that a landlord under covenant to repair certain specified parts of a building would not be bound to rebuild even those parts if the whole building be destroyed.

Donnelly v. Hawes, 9 Ky. Opin. 711.

The landlord can not be required to make repairs unless he has expressly agreed to do so.

Louisville Soap Mfg. Co. v. Richardson, 8 Ky. Opin. 437.

§ 152. Covenants and agreements as to repairs and alterations.

On the assignment of a lease, and in the absence of an express covenant on the part of the assignee to make repairs on the leased premises, the law will not imply such a promise.

Dwyer v. Bass, 6 Ky. Opin. 657.

§ 157. Improvements by tenant and covenants therefor.

Where a tenant voluntarily abandons the leased premises, he can not recover from the landlord the value of the improvements placed on the land for his own convenience.

Irvie v. Laswell, 4 Ky. Opin. 672.

Although a moral sub-lease from the lessee of minors, for the indefinite term of their minority, was void, it is still available for protecting the sublessee's possession as a resulting lien for improvements made by him with the sanction of the lessee and agent of the infants, in the face of an assurance by them that he might enjoy the possession during said infancy.

Elrod v. Anderson, 2 Ky. Opin. 141.

Under a tenancy by permission, fencing, grubbing, ditching and clearing lands are not permanent improve-

ments, as all these things are necessary to be done to enlarge the products of the farm and increase the profits of the tenant; but improvements to buildings and the making of a cistern are of a permanent character and the owner is liable therefor.

Guy v. Guy, 2 Ky. Opin. 265.

A claim of a tenant to have buildings put upon the leased premises for his convenience and for the purpose of trade considered as personal property is to be considered with the greatest latitude and indulgence.

Harrison v. Schluder, 2 Ky. Opin. 505.

Where a tract of land is permitted to be used for a considerable time, and good and lasting improvements are made by the tenant by will, his estate should not be charged rent for same, unless an equitable settlement be made for such ameliorations.

Anderson v. Anderson, 3 Ky. Opin. 541.

§ 159. Remedies for failure to make improvements.

If a tenant fails to make improvements contemplated by the lease or to perform other acts stipulated therein, the lessor may recover damages for non-performance.

Walton v. Young's Exr., 3 Ky. Opin. 251.

(E) INJURIES FROM DANGEROUS OR DEFECTIVE CONDITION.

§ 164. Injuries to tenants or occupants.

It is as much the duty of a tenant as it is the landlord to look to the condition of the premises, especially when the appearance of a building indicates decay; and unless knowledge of the dangerous condition of a building is brought home to the landlord no recovery can be had by the tenant for an injury caused by the unsafe building.

Battres v. Heiss, 11 Ky. Opin. 103.

§ 166. Injuries to property of tenant on premises.

Where a landlord agrees to make repairs as soon as practical and fails to do so, he is liable to the tenant

for the damages he sustains on account of such failure.

Kentucky Improvement Co. v. Barr, 8 Ky. Opin. 30.

(F) EVICTION.

§ 172. Act or omission of landlord.

Where a sub-tenant is in possession with the consent of the landlord, and if without any breach of the terms of the lease, he causes him to abandon the premises he should be held to the consequences of his own act.

Schurman v. Jones, 5 Ky. Opin. 97.

Where a tenant alone sues his landlord for dispossessing him and for conversion of his crops, and alleges that his father as well as himself was turned out of possession, on motion of the defendant, the court should have struck out that part of the petition relating to the father.

Wallace v. Monlinter, 11 Ky. Opin. 701.

VIII. RENT AND ADVANCES.

(A) RIGHTS AND LIABILITIES.

§ 181. Nature of rent.

One who is the owner of land by parol contract, and is in possession, can not be charged with rent of the premises, since rent is only chargeable where the relation of landlord and tenant exists.

Miller v. Ingalls, 12 Ky. Opin. 102.

§ 182. Covenants and agreements to pay rent.

Where a written lease does not fix the rental, it is competent for the lessor and the lessee to orally agree upon and fix the rental.

Guthrie's Exr. v. McGoodwins, 6 Ky. Opin. 568.

§ 184. Deposits and other security by tenant.

Where premises are leased by written lease for two years, and the lessee and others sign a covenant that the lessee will pay the rent for the first year, such other persons are

not liable for the defalcation during the second year.

Wallace v. Newell, 8 Ky. Opin. 753.

§ 186. Disturbance of possession of tenant.

The damages for loss by removal of the dam can only be estimated from the actual time of its removal, and will not affect the rent already earned.

Wells v. Ragland, 4 Ky. Opin. 254.

Where a farm and mill were leased providing that in case the mill dam should be removed by law, during said term (five years) a proper reduction in rent shall be made, etc., also providing for a payment of \$1,000 annually, no reduction should be allowed on the contract for the time the mill remained undisturbed.

Wells v. Ragland, 4 Ky. Opin. 254.

Where the tenant is evicted before his rent becomes due, the landlord can not recover for the unexpired term from the date of eviction.

Vaughan's Guardian v. Burkhardt, 8 Ky. Opin. 516.

§ 193. Cancellation of lease.

An agreement to cancel a lease does not release the tenant and his surety from liability for rent already accrued thereunder.

Meyer v. Miller, 10 Ky. Opin. 867.

§ 196. Holding over after expiration of term.

In the absence of a special agreement as to rent to be paid by a tenant holding over after the expiration of his lease, he will be required to pay the same rent as under the lease.

Maupin v. Thompson, 3 Ky. Opin. 507.

§ 200. Amount and installments.

Where in a lease contract the rent is to be six per cent. of the valuation, to be made each five years by two arbitrators, one to be appointed by each party, with a clause that if they fail to agree on a valuation, that fixed by the assessor was to be taken, a party to such contract is not entitled to have such valuation fixed by a court where no fraud is charged, and neither party

has failed to appoint an arbitrator in good faith.

Owen & Mills v. Humphrey, 8 Ky. Opin. 324.

Where the rent in a lease depends upon the valuation of the realty, to be determined by arbitrators, or in case of their failure, the valuation fixed by the assessor is to be taken, and the arbitrators in good faith can not agree, the assessor's valuation determines the amount of rental to be paid.

Owen & Mills v. Humphrey, 8 Ky. Opin. 324.

§ 203. Persons entitled.

§ 204.—In general.

A tenant who rents lands of the husband, while a suit is in progress between husband and wife for divorce and alimony, and restoration of property, will be held liable to the wife, a successful litigant, for her pro rata of the rent, notwithstanding a prior payment of same to the husband.

Ham v. Hamilton, 3 Ky. Opin. 294.

Where appellants subrented the premises and agreed to pay the rent to the landlord, while the promise does not appear to have been made directly to appellee, still he must be regarded as having affirmed the contract; and there is no reason why he should not recover the rent from appellants.

Euhelberger v. Pfaender, 4 Ky. Opin. 661.

A voluntary alienation of real estate entitles the alienee to the rents falling due after the alienation, and where a sale is made under a judgment, it is a sale in which the court acts for and at the instance of the owners, and is the same as if made by the owners in person, and the purchaser at such a sale is entitled to the rents falling due after such sale.

Graves v. Prewitt, 10 Ky. Opin. 242.

§ 206. Persons liable.

§ 207.—In general.

Though under the revised statutes, the husband can not sell his wife's lands, nor can they be sold for his debts; he has only the use of them, and when the husband leases them for

a period not greater than three years, and receives the rent therefor, such a payment will discharge the tenant from all liability to pay it again to the wife or any one else in case of the death of the husband.

Dykes v. Blakemore, 2 Ky. Opin. 290.

As to the residue of rent, evidenced by a note to the husband, the wife is entitled to the same; and even though the note be not assigned by the husband, and at his death passes to his personal representative, the latter can not collect it, because upon the death of the husband, the wife became entitled to the uncollected rent, and an assignee of the note takes it subject to that contingency.

Dykes v. Blakemore, 2 Ky. Opin. 290.

When one enters into possession as a purchaser and not as a tenant, he is not liable for the rents of the real estate.

Smith v. Smyser, 11 Ky. Opin. 176.

§ 208.—Transfer of lease or agreement.

Where one who was a conditional purchaser of land as tenant of the vendor, abandoned his attitude as a purchaser after cultivating the land one year, and sold his interest to another and put him in possession, the landlord had the right to treat the transaction as a transfer of the lease only.

Len v. Henson, 6 Ky. Opin. 315.

§ 212. Payment.

Where a tenant makes a tender of rent, which was payable in money, by offering corn, the amount must be measured up and set apart specifically for that purpose.

Walton v. Mize, 4 Ky. Opin. 240.

(B) ACTIONS.

§ 222. Defenses in general.

Where the lessee is sued for rent, he may show satisfaction of the claim by proving that he paid the rent as agreed upon, by arriving at the value of the property in a different manner from that adopted in the written lease.

Guthrie's Exr. v. McGoodwins, 6 Ky. Opin. 568.

Forfeiture of leased premises to the government by reason of violation of the revenue laws by the lessees, excuses the lessees, at the expiration of the lease, from the obligation to surrender the premises to the lessor, but does not release them from payment of the stipulated rents.

Lair v. Reynolds, 7 Ky. Opin. 182.

§ 223. Set-off and counterclaim.

Where a tenant, by written lease for five years, agrees to pay each of three joint landlords a stipulated rental, and where to induce one of such lessors to sign the lease the tenant agrees to pay him an extra amount and writes a letter to such landlord agreeing to such extra payment, and afterward makes such extra payments, he can not by counterclaim recover back such extra rent in a suit instituted on such written lease.

Davis v. Gault, Admr., 8 Ky. Opin. 28.

§ 227. Time to sue and limitations.

In the settlement of mutual accounts between landlord and tenant, under a specific lease, the statute of limitations will not apply for either party.

Ross v. Sanders, 2 Ky. Opin. 530.

§ 229. Attachment.

The right of an attachment secured by a landlord against his tenant depends on whether he has reasonable grounds to believe that his debt will be lost unless an attachment issues.

Mattingly v. Mattingly, 8 Ky. Opin. 777.

It is held that landlords suing out attachments are not held (under the provisions of R. S., p. 99) to the same strictness of proof as parties proceeding under the code of practice to secure ordinary debts.

Johnson v. Dunn, 9 Ky. Opin. 26.

§ 230. Pleading.

An answer held not sufficient to amount to a plea of non est factum in an action on a lease.

Dunn v. Downing's Exrs., 7 Ky. Opin. 409.

The allegations of an answer were held such as to amount to a confession of the allegation of an amended

petition, that defendants signed the lease as sureties of the lessee.

Dunn v. Downing's Exrs., 7 Ky. Opin. 409.

A petition on an account, charging rents upon land for a stated period imports an allegation that the lands were used for the time as charged, and an answer which does not controvert this fact is properly treated by the court as an admission, and an instruction predicated on this view is not erroneous.

Sullivan v. Mallony, 2 Ky. Opin. 56.

An allegation in an answer, in an action for rent, that the lessor "had due notice and agreed to look to John H. Lair for liabilities of the firm," can not be regarded equivalent to the averment that the lessor released defendant from his written undertaking to pay the rent as it accrued.

Lair v. Reynolds, 7 Ky. Opin. 182.

An allegation as to the value of rents can not be taken as confessed.

Mercer's Exr. v. Caldwell, 7 Ky. Opin. 58.

§ 232. Amount of recovery.

In a settlement of accounts between landlord and tenant, the tenant is entitled to credit for an allowance for whatever portion of the leased premises may have been sold and delivered to others by the landlord.

Ross v. Sanders, 2 Ky. Opin. 530.

(C) LIEN.

§ 239. Nature of landlord's lien.

Where property of a tenant on the leased premises has been attached, it was held that it was proper for the court to order the surrender of a horse, to be sold in case the remaining property does not sell for a sum sufficient to satisfy the landlord's claim for rent, and if the horse can not be surrendered, the remedy is by suit on the attachment bond.

Craig v. Burgess, 7 Ky. Opin. 389.

§ 242. Right to lien.

A tenant at the expiration of his lease has a lien on the ground for his improvements, where they were erected by the tenant at the instance

of the lessor with the express agreement that he was to pay for them at the end of the term.

DeBard v. Owings, 9 Ky. Opin. 367.

§ 246. Subject-matter to which lien attaches.

A landlord has a lien on crops raised by sub-tenants to secure the rent and they have no right to reserve the crops, and if they do so, they should be regarded as the agents of the original tenant.

Ringo v. Ford, 7 Ky. Opin. 561.

The lien of a landlord on the proceeds of the premises and on fixtures and household furniture of the tenant owned by him after possession, can not be for more than one year's rent nor for rent which has been due for more than 120 days.

Green v. Smith's Trustees, 8 Ky. Opin. 673.

The landlord's lien under the statute can only attach to property belonging to the tenant, and can not be for more than one year's rent due or to become due.

Sargent v. Farrar's Assignee, 11 Ky. Opin. 2.

§ 248. Priorities.

A landlord has a prior lien on the household effects of his tenant for rents in arrears, under Sec. 14, ch. 56, 2 Stant. R. S. 94, over a mortgagee, whose property was of record; however, this does not affect property obtained after the tenant went into possession.

Keasy & Brother v. Robinson, 3 Ky. Opin. 123.

Although appellee had a preferred lien on the goods in the house, as landlord, for the rent, still he might waive that lien and enforce the collection of his debt, as creditor, by an ordinary action, the lien secured to landlord being merely cumulative or ancillary.

Millett v. McGehee, 5 Ky. Opin. 608.

Landlord's lien on goods must be satisfied before general creditors, and the sale of such goods does not oper-

ate as an assignment for the benefit of creditors under Act of 1856.

Freeman v. Levi, 8 Ky. Opin. 1.

The landlord's lien is superior to a mortgage lien when it has not been waived.

Ferguson v. Godsham's Assignee, 10 Ky. Opin. 33.

§ 249. Rights and remedies of creditors of tenant.

A landlord has a lien on the produce raised by his tenant, and a bona fide purchaser of such produce after its removal from the leased premises is bound to take notice, at his peril, of the existence of such lien.

Barret v. Mossie, 8 Ky. Opin. 528.

§ 251. Removal or transfer of property in general.

One who purchases property of a tenant on the leased premises is bound to make inquiry as to whether the tenant is indebted to the landlord, and as to whether the landlord has an exclusive lien on the property.

Craig v. Burgess, 7 Ky. Opin. 389.

Under § 16, art. 2, ch. 56, 2 R. S., relating to landlord's lien, the lien exists for fifteen days after the removal of the property, against one who is not a bona fide purchaser.

Henning & Speed v. Muldoon & Co., 7 Ky. Opin. 277.

Persons who purchase property of a tenant do not bring themselves within the protection of the statute, § 16, art. 2, ch. 56, 2 R. S., relating to landlord's lien, where there is no showing as to the amount of the debt constituting the consideration given by the purchaser for the property removed from the leased premises.

Henning & Speed v. Muldoon & Co., 7 Ky. Opin. 277.

Where property is removed openly from leased premises and without fraudulent intent, and not returned, the landlord's lien is lost as to it unless asserted by a procedure within fifteen days from the time of removal.

Ferguson v. Godsham's Assignee, 10 Ky. Opin. 33.

§ 252. Rights and liabilities of purchasers of property.

Where real estate under lease is not surrendered, but is left vacant, the landlord purchasing goods subject to his lien for rent, may deduct from purchase price the amount of rent due for the time the real estate was vacant.

Freeman v. Levi, 8 Ky. Opin. 1.

Where one without notice of a landlord's lien buys property at an execution sale conducted by the sheriff, the title passes to him and it becomes the sheriff's duty to pay to the landlord the rent or so much of it as the proceeds of the sale will pay, and where the sheriff fails to do so the landlord may cross-petition against the sheriff and the tenant secure the proceeds of such sale to apply on his rent charges.

Monarch v. Dean, 11 Ky. Opin. 596.

§ 254. Waiver, loss, or discharge of lien.

While under the statute the landlord has a lien on the produce of the premises rented under certain conditions, such a lien is lost if such property is removed from such rented premises.

Bell v. Bryant, 8 Ky. Opin. 309.

The reducing of the amount of rent by the landlord, at the tenant's solicitation, will not affect or waive the landlord's lien.

Keasy & Brother v. Robinson, 3 Ky. Opin. 123.

The fact that a landlord has contracted for additional security is not enough to show that he intended to waive a lien given to him by the statute.

Neely v. Henson, 9 Ky. Opin. 458.

A landlord has a lien on his tenant's crop, and an attempt by contract to secure a lien on a horse is not a waiver of the statutory lien.

Neely v. Henson, 9 Ky. Opin. 458.

§ 257. Enforcement.

§ 262.—Actions.

In an action by a landlord for rent,

it is not necessary to make sub-tenants parties.

Ringo v. Ford, 7 Ky. Opin. 561.

(D) DISTRESS.

§ 264. Statutory provisions.

Section 14, art. 2, ch. 56, R. S., restricting the lien acquired by a landlord under a distress warrant, does not apply to § 5, relating to attachment for rent due.

Albro v. Satchwell, 7 Ky. Opin. 348.

§ 265. Right to distrain.

The landlord may have a distress warrant for rent due him, and the fact that the tenant holds a valid claim for work and labor done for the landlord prior to the landlord's beginning his suit will not preclude him from recovering the amount due for rent when the tenant fails to plead the claim due him by way of set-off.

Mornan v. Winston, 10 Ky. Opin. 772.

§ 266. Defenses and ground of opposition.

A tenant against whom a distress warrant is issued for rent, who holds a claim against the landlord not growing out of or connected with the rent, may plead his claim as a set-off.

Mornan v. Winston, 10 Ky. Opin. 772.

§ 269. Property subject to distress.

Where a distress warrant is issued at the instance of a landlord against the goods of his tenant, and pleading by the tenant is defective which avers that at the time of the levy and sale he was a bona fide housekeeper with a family and that the personal property seized and sold was by law exempt from seizure and sale under a distress warrant, the pleader should have stated what number or quantity of each character of personal property levied on he owned at the time of the seizure so that the court might determine whether the property taken was exempt.

Harrison's Trustee v. Kuntz, 8 Ky. Opin. 688.

Before personal property can be subject to a distress warrant against a tenant, it must appear that such property belonged to the tenant at the time or after the accrual of the rent distrained.

Sargent v. Farrar's Assignee, 11 Ky. Opin. 2.

In a contest between a landlord and a subtenant the personal property of the subtenant on the premises is liable for the rent accruing after he entered, and a contest between the tenant and subtenant can not regulate the amount of the landlord's recovery unless he has accepted it in lieu of his contract with the tenant, and the fact that the landlord received a portion of the rent money paid by the subtenant on his contract with the tenant is not evidence of an acceptance of the contract between the tenant and subtenant.

Sutton v. Perkins, 11 Ky. Opin. 76.

A tenant has no exemption as against his landlord as to tobacco raised, for the exemption extends only to such crop as would be suitable for the purpose of provisions.

Hayden v. Crutchfield's Exr., 11 Ky. Opin. 214.

§ 270. Proceedings to distrain.

On motion for judgment on bond for rent distrained, the obligors are not liable beyond the amount distrained, and ten per centum statutory damages, under § 721, Civil Code.

Millett v. Millett, 3 Ky. Opin. 431.

The price for which property was rented, under a contract, is prima facie the value of the use of the property, and the burden of proof is on defendants to show that they could only get for it the amount reported as received by them.

Herndon v. Huston & Williams, 2 Ky. Opin. 329.

IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

§ 277. Re-entry.

Where by the terms of a lease it is stipulated that the lessor may re-enter upon the failure to pay rent, the lessor may annul the contract on fail-

ure to pay, and is entitled to possession.

Delph v. Finnel, 2 Ky. Opin. 91.

The lessee having failed to execute a written contract for the rent of the premises, the lessor was held entitled to recover the possession; but as such recovery would involve the loss of improvements, the lessee may elect to execute the writing or submit to eviction.

Delph v. Finnel, 2 Ky. Opin. 91.

§ 279. Action for recovery of possession.

The failure of a defendant to deny the allegation in a petition, "that the defendant has been notified for more than — months to surrender possession," must be regarded as an admission of legal notice.

Ricks v. O'Neil, 2 Ky. Opin. 219.

In an action of ejectment, where a tenant, repudiating his lease and claiming title to the land, changed the possession from a friendly to a hostile holding, it is not necessary for the owner to give notice to vacate the premises.

Casey v. Klette, 2 Ky. Opin. 552.

Appellant's bond to appellee in replevin of distress, suspending his execution for the purpose of trying the rights of property, bound her only for the value of wheat subject to the lien for rent.

Alexander v. Paxton, 1 Ky. Opin. 315.

§ 293. Summary proceedings.

§ 297.—Notice.

An open and adverse holding after a lease expires authorizes the presumption of notice to the landlord, and it is error to instruct the jury that actual notice must be given by the adverse claimant in possession.

Smith v. Seaton, 1 Ky. Opin. 494.

X. RENTING ON SHARES.

§ 322. Construction and operation of contracts in general.

A lease providing, "to have the whole tract free of rent for the first year, said Walton to build a hayshed, press, stables, etc., upon the place,

after he has built the shed, etc., and the land sown in grass, I am to allow him half the hay crop and all the other," is held to mean that the erection of the buildings, etc., was to be done the first year, in which rent was to be free.

Walton v. Young's Exr., 3 Ky. Opin. 251.

§ 325. Rights and liabilities as to land.

A conveyance of land with a provision that the tenant then in possession should have the use of the land until the fall of the year in which the land is sold, gives the tenant the implied right of ingress and egress thereafter for the purpose of removing the crop raised by him on the land; and the tenant is not liable for rent for this use of the land.

Miller v. Drake, 2 Ky. Opin. 308.

A tenant can not be held liable for the natural decline of property used by him in the cultivation of a farm, where the stock, implements, etc., were to be furnished by the landlord.

Ross v. Sanders, 2 Ky. Opin. 530.

§ 326. Rights and liabilities as to crops.

A contract between a tenant and the wife of a deceased land owner, for the cultivation and making of a crop for the ensuing year, is binding as to the administrator of the estate, who had knowledge of the existence thereof; and she is not held accountable for the products of same, unless it be for such amount as above her dower, not then assigned her, and for her yearly support and such improvements and repairs necessary to make the crop.

Rousseau & Wells v. McClure, 2 Ky. Opin. 416.

A tenant who was placed in possession by the wife, of lands belonging to her deceased husband, to cultivate the land for the year, and no objection was made thereto by the administrator, is not liable to the estate for an accounting.

Rousseau & Wells v. McClure, 2 Ky. Opin. 416.

§ 328. Liens on crops.

Landlords have a lien on the produce of the farm, and if sold by the

tenant, are entitled to the proceeds of the sale.

Kimbraugh v. Cuson, 1 Ky. Opin. 363.

§ 331. Actions between parties.

Under a contract between landlord and tenant, to cultivate a farm, the profits to be divided yearly, the landlord is not entitled to charge for rents of the farm; and if the tenant fails to perform his contract, the landlord is entitled to damages, but a reasonable rent of the land, would not be a criterion therefor.

Ross v. Sanders, 2 Ky. Opin. 530.

LARCENY.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 1. Nature and elements in general.

§ 2. Statutory provisions.

§ 3. Intent.

§ 4. Property subject of larceny.

§ 5.—Nature in general.

§ 7.—Ownership.

§ 11. Taking.

§ 14.—Trick or device.

§ 15.—Conversion by trustee, bailee, agent, or servant.

§ 17. Asportation.

§ 23. Grand or petit larceny, and degrees.

II. PROSECUTION AND PUNISHMENT.

(A) INDICTMENT AND INFORMATION.

§ 28. Requisites and sufficiency in general.

§ 30. Description of property.

§ 32. Ownership of property.

§ 40. Issues, proof, and variance.

(B) EVIDENCE.

§ 42. Admissibility.

§ 43.—In general.

§ 46.—Value of property.

§ 47.—Ownership of property.

§ 54. Weight and sufficiency.

§ 60.—Ownership and possession or custody of property.

(C) TRIAL AND REVIEW.

§ 69. Instructions.

§ 81. Verdict.

§ 82.—In general.

§ 85. Appeal and error.

See Burglary; Receiving Stolen Goods. Instruction as to consideration of testimony of accomplice, see Criminal Law, § 780.

Not a degree of robbery, see Robbery, § 6.

Robbery and larceny not degree of same offense, see Criminal Law, § 28.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 1. Nature and elements in general.

Where a mare was forced out of the immediate possession of the owner and escaped to the commons, and was afterward taken away by the intimidator, it constituted larceny and not robbery.

Whitt v. Commonwealth, 1 Ky. Opin. 185.

§ 2. Statutory provisions.

While horse-stealing is made a distinct offense by the statute it is also embraced in the larceny statute, and the state may elect as to what statute it will prosecute under.

Alberts v. Commonwealth, 9 Ky. Opin. 682.

§ 3. Intent.

Felonious intent is required to render one guilty of larceny, and one who without felonious intent to deprive the owner of his property takes possession of it and after taking possession forms the design to deprive the owner of the property, is not guilty of larceny, because the intent to steal must exist at the time of taking possession.

Stevens v. Commonwealth, 8 Ky. Opin. 800.

Where a minor exchanges his mare for another animal, and after the exchange goes at night and takes the mare originally belonging to him from the possession of the person to whom he traded her, and makes no effort to conceal the fact of his possession, these acts do not show a felonious intent, but rather a purpose to repudiate his contract.

Utz v. Commonwealth, 11 Ky. Opin. 211.

There can be no evidence of a felonious intent on the part of one who

took and removed logs under the belief that as part owner he had a right to take them, and where such logs are in the possession of the sheriff, who has announced that he has no intention of having them appraised, such possession will not deprive the owners of the right to remove the logs.

Searls v. Commonwealth, 13 Ky. Opin. 556.

§ 4. Property subject of larceny.

In larceny, the identification of the property and its value is essential to determine not only the offense, but the grade of the crime.

Nichols v. Commonwealth, 3 Ky. Opin. 258.

§ 5.—Nature in general.

In the absence of a statute, it is not a felony to steal or injure a dog.

Mirdle v. Commonwealth, 10 Ky. Opin. 500.

§ 7.—Ownership.

A defendant can not be guilty of horse stealing if in fact the horse was owned by him.

Martin v. Commonwealth, 8 Ky. Opin. 853.

§ 11. Taking.

§ 14.—Trick or device.

Where the owner of personalty is induced to part with the possession of his property by the fraudulent practices and tricks of the defendant, who intends, at the time he gets the possession, feloniously to convert it to his own use, the defendant is guilty of larceny; but it is not larceny where the owner parts with the title of his property, although he may be cheated out of such title.

Jones v. Commonwealth, 10 Ky. Opin. 954.

One not the owner of a sow and pigs who goes with a purchaser, points them out to him, sells them to him and receives the price therefor is guilty of larceny or hog stealing just the same as though he had taken possession of the property sold and physically delivered them to the purchaser.

Cummins v. Commonwealth, 12 Ky. Opin. 215.

If by artifice or fraud of the thief intending to steal goods the owner is induced to part with their possession merely, and does not part with the title, it is such a taking as will sustain a charge of larceny.

Cummins v. Commonwealth, 12 Ky. Opin. 215.

§ 15.—Conversion by trustee, bailee, agent or servant.

Where money is deposited with the agent of an express company for transportation to designated points and is feloniously abstracted by the agent, he is guilty of grand larceny, the title and possession being in the express company as a common carrier.

Warmouth v. Commonwealth, 11 Ky. Opin. 847.

§ 17. Asportation.

Where defendant was charged with carrying away one lot of wheat, the fact that the carrying away occurred on three different days does not require the commonwealth to treat the acts committed on each day as a separate and distinct offense, since the acts may be treated as a continuous offense.

Commonwealth v. McDaniel, 6 Ky. Opin. 710.

§ 23. Grand or petit larceny, and degrees.

A charge of hog stealing where the value of the hog is four dollars or more is grand larceny, notwithstanding the charge is preferred under the special hog stealing statute.

Combs v. Commonwealth, 9 Ky. Opin. 20.

II. PROSECUTION AND PUNISHMENT.

(A) INDICTMENT AND INFORMATION.

§ 28. Requisites and sufficiency in general.

The time when an offense is charged to have been committed is not material except to show that it was committed before the finding of the indictment, except where time is an ingredient in the offense, and hence proof that one stole a described

horse in October, 1872, or in December, 1874, would warrant the conviction of the accused under either one of two indictments.

Raley v. Commonwealth, 9 Ky. Opin. 189.

An indictment for grand larceny is sufficient which charges that "The said ——— feloniously took and carried away one buggy of the value of \$100 and two horses of the value of \$100 each, the personal property of James S. Long."

Thomas v. Commonwealth, 10 Ky. Opin. 860.

§ 30. Description of property.

An indictment which simply charges that a number of United States treasury notes and national bank notes were feloniously taken by accused, without any further description of the same, was held insufficient.

Commonwealth v. Nichell, 6 Ky. Opin. 61.

§ 32. Ownership of property.

An indictment charging defendant with stealing "one horse, the personal property of Charles A. Haskins, worth \$100.00," is sufficient to protect defendant against any subsequent action, by reason of a too general description.

Clark v. Commonwealth, 3 Ky. Opin. 41.

Where the ownership of stolen property is charged to have been in a named person, there is no variance when the proof shows such property to be owned by said person's wife, where it is also shown that it was in the possession and under the control of the husband as agent for the wife at the time it was stolen.

Thomas v. Commonwealth, 10 Ky. Opin. 860.

One can not be guilty of stealing such animals as are *fearae naturae* and unclaimed, or of wild fowls at their natural liberty; and an indictment for unlawfully taking and carrying away pigeons is bad when it does not allege that the pigeons were tame and in the care and custody of the owner.

Carter v. Commonwealth, 11 Ky. Opin. 92.

§ 40. Issues, proof, and variance.

A charge in an indictment that the property stolen was the property of Fry, Marsh & Kinney will sustain a conviction where the proof shows that such parties jointly owned such property.

Redd v. Commonwealth, 9 Ky. Opin. 325.

(B) EVIDENCE.

§ 42. Admissibility.

§ 43.—In general.

When property has been stolen in this state, and found in the possession of the accused in another state, the court may look into the legal relation he sustains to it, and if this be a guilty possession, it is evidence that he was the guilty taker.

Clark v. Commonwealth, 3 Ky. Opin. 41.

Evidence of a witness, as to what a little girl of 9 years of age said, as to identification of defendants, is a material fact to establish an alibi only, in an action for larceny, the best evidence of this fact, being the statement of the girl under oath, to the jury, if capable of testifying under oath.

Nichols v. Commonwealth, 3 Ky. Opin. 258.

The declarations of a party accused of theft as to the manner in which he may have acquired possession of the stolen property are always admissible in his behalf, where the guilt of the accused is made to turn alone upon such possession.

Carter v. Commonwealth, 5 Ky. Opin. 794.

In an indictment for larceny evidence that the prisoner had committed another district felony than that for which he is on trial is inadmissible.

Washington v. Commonwealth, 10 Ky. Opin. 170.

§ 46.—Value of property.

What was done and said by the party from whom the defendant received the goods is competent as a part of the transaction.

Bracken v. Commonwealth, 1 Ky. Opin. 22.

§ 47.—Ownership of property.

Where one is charged with hog stealing, and it is shown that the hog was found on the premises of the accused, and he shows that he said to several witnesses that it was not his hog but was a stray, it is not competent evidence for the state to bring a witness living near the accused, but with whom accused had not had any conversation, to testify that he had seen the hog running about the premises of the accused and that the accused "had not told him the hog was a stray."

Turner v. Commonwealth, 11 Ky. Opin. 842.

§ 54. Weight and sufficiency.

It is not sufficient to prove that the goods were stolen, but it must be proved that the accused knew they were stolen.

Bracken v. Commonwealth, 1 Ky. Opin. 22.

§ 60.—Ownership and possession or custody of property.

The possession of personal property is prima facie, though not conclusive evidence of ownership.

Bracken v. Commonwealth, 1 Ky. Opin. 22.

(C) TRIAL AND REVIEW.**§ 69. Instructions.**

In a prosecution for stealing a horse in Kentucky and removing it to Ohio, an instruction: "That possession of stolen property in Ohio is no evidence of a crime having been committed in Kentucky, and such possession can not be presumed as a guilty possession against a party indicted in Kentucky," was properly refused.

Clark v. Commonwealth, 3 Ky. Opin. 41.

In a charge for hog stealing, notwithstanding the fact that none of the witnesses placed the value of the hogs at less than four dollars, the court should have instructed the jury as to what constitutes petit larceny and as to the circumstances under which they were authorized to find the accused guilty of that offense.

Bronaugh v. Commonwealth, 11 Ky. Opin. 137.

§ 81. Verdict.**§ 82.—In general.**

Where one is charged with larceny in one count of an indictment which is good, but is convicted under a second count which is bad, the judgment of conviction should be arrested.

Alberts v. Commonwealth, 9 Ky. Opin. 682.

§ 85. Appeal and error.

This court can only determine whether evidence offered and rejected in a criminal case was prejudicial to the accused, when it is stated what it will prove, but where in the trial of one charged with grand larceny the defense offers in evidence the property charged to have been stolen, for the purpose of the jury's inspection, this court can not determine whether its rejection was prejudicial to the substantial rights of the accused or not.

Wilson v. Commonwealth, 13 Ky. Opin. 506.

LAW AND FACT.

Conclusions of pleader, see Pleading, §§ 8, 9.

LAW OF CASE.

Former decision of Court of Appeals, see Appeal, §§ 1193, 1195; Courts, §§ 91, 99.

On second appeal, see Appeal, § 1097.

LEADING QUESTIONS.

See Witnesses, § 239.

LEASE.

See Landlord and Tenant, II.

For term of years, see Landlord and Tenant, IV.

In name of married women, see Husband and Wife, § 134.

Mining leases, see Mines and Minerals, II, C.

Nature of mining lease, see Mines and Minerals, § 56.

Of ward's property, see Guardian and Ward, § 44.

Right of husband to lease wife's real estate, see Husband and Wife, § 137.

When required to be in writing, see Frauds, Statute of, § 57.

LEGATEES.

See Wills, VI, B.
 Contribution between, see Descent and Distribution, § 81.
 Interest subject to execution, see Execution, § 45.
 Liability to estate, see Executors and Administrators, § 294.
 Mutual rights and liabilities of, see Descent and Distribution, § 81.
 Rights and liabilities of, see Wills, VII.
 When bond required of, see Descent and Distribution, § 73.

LEGISLATURE.

Awarding costs in election contest, see Election, § 306.
 Delegation of legislative power, see Constitutional Law, § 59.

LETTERS.

Sufficiency as memorandum, see Frauds, Statute of, § 99.

LEVY.

Indorsement of on execution, see Execution, § 138.
 Of attachment, see Attachment, § 175.
 Of execution, see Execution, §§ 123, 124, 126.
 Of taxes, see Taxation, V.

LEWDNESS.

§ 4. Indictment or information.
 It is unnecessary to allege in an indictment for lascivious indulgence that the defendant procured evil disposed persons to meet together if she keeps a house for such purpose and permits such practices.

Mills v. Commonwealth, 5 Ky. Opin. 144.

LIBEL AND SLANDER.**I. WORDS AND ACTS ACTIONABLE AND LIABILITY THEREFOR.**

§ 3. Malice.
 § 4.—In general.
 § 5.—Implied.
 § 6. Actionable words in general.

§ 7. Words imputing crime and immorality.

§ 19. Construction of language used.

§ 26. Repetition.

III. JUSTIFICATION AND MITIGATION.

§ 56. Facts constituting justification.

IV. ACTIONS.**(A) RIGHT OF ACTION AND DEFENSES.**

§ 71. Defenses in general.

(B) PARTIES, PRELIMINARY PROCEEDINGS, AND PLEADING.

§ 79. Declaration, complaint, or petition.

§ 80.—Form and requisites in general.

§ 83.—Intent and malice.

§ 85.—Setting out defamatory matter.

§ 86.—Innuendoes.

§ 90. Plea or answer.

§ 91.—Matters of defense in general.

§ 98. Amended and supplemental pleadings.

(C) EVIDENCE.

§ 101. Presumptions and burden of proof.

§ 102. Admissibility.

§ 103.—In general.

§ 104.—Intent and malice.

§ 111. Mitigation.

(D) DAMAGES.

§ 120. Exemplary.

§ 121. Amount awarded.

(E) TRIAL, JUDGMENT, AND REVIEW.

§ 122. Conduct of trial.

§ 123. Questions for jury.

§ 124. Instructions.

V. SLANDER OF PROPERTY OR TITLE.

§ 139. Actions.

I. WORDS AND ACTS ACTIONABLE AND LIABILITY THEREFOR.

§ 3. Malice.

§ 4.—In general.

Malice is an indispenable ingredient in slander, without it there can be no slander in the absence of evidence of special damage.

Croan v. Crenshaw, 8 Ky. Opin. 745.

Malice upon a plea of justification filed as an answer is not required to be proven, as such an issue places upon the defense the burden of showing the truth of the charge made, and if he fails a recovery must be had against him.

Robards v. Allen, 10 Ky. Opin. 207.

To constitute slander the words, if spoken, must have been spoken with a malicious purpose, and while the mere utterance may be prima facie evidence of malice, still the presumption of malice may be rebutted, and hence is not to be conclusively presumed from the speaking of the words.

Sleodd v. Jessie, 10 Ky. Opin. 299.

§ 5.—Implied.

Where words spoken are in themselves actionable, malice may be presumed from their falsity, but this presumption may be rebutted by evidence.

Croan v. Crenshaw, 8 Ky. Opin. 745.

While malice is an essential ingredient in slander, it will be implied from the speaking of words falsely which import slander, unless they are spoken in the performance of some public or private duty.

Williams v. Noel, 8 Ky. Opin. 834.

§ 6. Actionable words in general.

It is not slander to charge that one has falsely taken an oath prescribed by an unconstitutional and void act of the legislature.

Burkett v. McCarty, 1 Ky. Opin. 100.

§ 7. Words imputing crime and immorality.

To charge one with being a thief is actionable, but where such words are followed by others of an explanatory nature showing that simply a trespass has been committed, such a charge is not slanderous.

Pillow v. Duncan, 10 Ky. Opin. 67.

The following words spoken are held not to be actionable: "By the time Bill Pillow steals a few more board trees from me I will be able to get another —. I am certain he stole a board tree from me. He had

a tree of mine made into boards without my permission. Can you make it out anything but stealing? It is stealing."

Pillow v. Duncan, 10 Ky. Opin. 67.

To say of another that "I will have Parks indicted for forgery by the grand jury," is a cause of action for slander, as the words carry with them a charge of a criminal nature.

Lenty v. Parks, 10 Ky. Opin. 543.

An action for slander will lie for the wilful publication of a false accusation, if the charge imports that the accused person is guilty of a felony.

Connor v. Bransford, 12 Ky. Opin. 399.

To charge that a person is a thief or a thieving person is equivalent to a specific charge, that he is guilty of larceny, and such a charge is slanderous.

Connor v. Bransford, 12 Ky. Opin. 399.

§ 19. Construction of language used.

It is a recognized rule in the construction of words complained of in an action of slander, that they should be taken in their obvious meaning and signification, and the sense in which they would be understood by those who hear them.

Thormann v. Gormby, 1 Ky. Opin. 461.

Words charged to be slanderous must be construed in the same sense that hearers of common and reasonable understanding would receive them, and when words are not such as necessarily import that one has been guilty of an indictable or infamous crime, and are capable of two constructions, the one importing guilt and the other not, the sense in which the words are used must be left to the jury.

Winstead v. Trice, 12 Ky. Opin. 590.

§ 26. Repetition.

Where defendant is not the originator of alleged slanderous words, plaintiff is not entitled to ask the jury to consider the slander as being as much

of an aggravated character as if the defendant himself had originated it.
Buchanan v. Atkinson, 3 Ky. Opin. 152.

III. JUSTIFICATION AND MITIGATION.

§ 56. Facts constituting justification.

Where the issue is not in speaking the words, but repeating a report, it can not go to the full justification of the defendant, and defeat the action.
Buchanan v. Atkinson, 3 Ky. Opin. 152.

IV. ACTIONS.

(A) RIGHT OF ACTION AND DEFENSES.

§ 71. Defenses in general.

It is no defense in a slander suit for the defendant to show that he was angry when he spoke the words charged.

Vest v. Norman, 10 Ky. Opin. 754.

(B) PARTIES, PRELIMINARY PROCEEDINGS, AND PLEADING.

§ 79. Declaration, complaint, or petition.

It is sufficient in an action for slander, that the petition charges that the defendant imputed to her a want of chastity.

Davis v. Ralston, 3 Ky. Opin. 286.

§ 80.—Form and requisites in general.

Allegations in a petition for libel were held not to import, of themselves, a cause of action against a defendant.

Mullins v. Curry, 7 Ky. Opin. 223.

To make a petition for slander good it must be averred that the words charged to have been spoken were maliciously uttered; and it is not sufficient to aver only that the words spoken were false and malicious.

Vert v. Norman, 9 Ky. Opin. 577.

Where words alleged are not slanderous per se, it is always necessary to make the petition sufficient to allege some pecuniary damage.

Miller v. Jones, 13 Ky. Opin. 595.

§ 83.—Intent and malice.

A petition for damages on account of slander, to be sufficient, must aver that the false words spoken were maliciously spoken of and concerning the plaintiff.

Lenty v. Parks, 10 Ky. Opin. 543.

§ 85.—Setting out defamatory matter.

To be sufficient, a petition for slander must set out the words spoken, and it is not sufficient to allege, without setting out the words spoken, that they were to the effect following or purporting, or that the words were of certain tenor, import and effect.

Miller v. Jones, 13 Ky. Opin. 595.

§ 86.—Innuendoes.

In an action for slander, the words of the petition can not be changed or enlarged by innuendo.

Wells v. Lacefield, 7 Ky. Opin. 10.

The plaintiff in an action of slander can not, by averment, enlarge the meaning or change the sense of the language actually used by the defendant.

Sleodd v. Jessie, 10 Ky. Opin. 299.

Words spoken of another, not importing criminality, are not per se actionable, and their meaning can not be enlarged by alleging that the person speaking them intended to charge more than the words on their face import.

Burton v. Wharton, 10 Ky. Opin. 760.

§ 90. Plea or answer.

An answer in an action for slander, which is unnecessarily vulgar and offensive and evinces an entire want of respect for the court, should be stricken from the record.

Wells v. Lacefield, 7 Ky. Opin. 10.

An answer to a petition charging slander, stating that defendant "did not speak of and concerning the plaintiff the defamatory words alleged to have been spoken, in manner and form as he has alleged," is a sufficient plea of not guilty.

Skaggs v. Moore, 5 Ky. Opin. 788.

§ 91.—Matters of defense in general.

An answer in a slander suit which

admits that the slanderous words were spoken, but which avers that the defendant only repeated words of another, which at the time he believed were true, is bad which fails to aver that the speaking of the words was without malice.

Denny v. Miller, 8 Ky. Opin. 144.

§ 98. Amended and supplemental pleadings.

When there are several causes of action set up in a petition, or one cause is pleaded in two or more paragraphs, the plaintiff may strike out any cause of action at any time, and this will not be an amendment entitling a party to a continuance.

Branshaw v. Berry, 10 Ky. Opin. 918.

The rule in slander is that words spoken must be proven substantially as they are laid, since equivalent words of slander will not do.

Sproul v. Reed, 10 Ky. Opin. 841.

When it is charged in a petition for slander that "Dr. Sproul signed my name and the name of Richard M. Coulter to a note to Dr. Flanagan for the sum of two hundred dollars. I never saw the note. He signed it without my authority and without the authority of Coulter," there is a fatal variance when the proof shows that: "Reed said he had never seen or signed such note, and if Flanagan held such note with his name to it his name had been forged either by the plaintiff, Sproul, or some other person, that said note was a forgery."

Sproul v. Reed, 10 Ky. Opin. 841.

(C) EVIDENCE.

§ 101. Presumptions and burden of proof.

It is not incumbent on a defendant in a slander suit, to prove the truthfulness of the words spoken beyond a reasonable doubt.

Ross v. Cunningham, 8 Ky. Opin. 793.

Where, in a suit for slander, actionable words are shown to have been spoken, the burden is then on the defendant to show the truth of the statements by facts justifying or excusing

them or such as tend to mitigate the damages.

Oliver v. Ewing, 9 Ky. Opin. 82.

Where the answer in a slander case pleads that the words spoken were true, the burden is on the defendant to prove the fact.

Callis v. Browning, 9 Ky. Opin. 878.

§ 102. Admissibility.

§ 103.—In general.

Where in action for slander a conversation between the parties at a meeting has been permitted to go to the jury on the question of motive, explanations offered by defendant at such meeting was counted in evidence on such questions.

Buchanan v. Atkinson, 3 Ky. Opin. 152.

Remarks of plaintiff to a third person, conveying the same meaning as that imputed to defendant, should also be permitted to go to the jury.

Buchanan v. Atkinson, 3 Ky. Opin. 152.

Conversation between parties, in an action for slander, at a meeting, solicited by the plaintiff, through her agent, should be permitted to go to the jury to enable them to form a correct judgment as to the motive of defendant.

Buchanan v. Atkinson, 3 Ky. Opin. 152.

The speaking of actionable words import malice, and will be regarded, prima facie, as malicious; but this will not preclude the defendant from showing the peculiar circumstances under which they were spoken, and the motive, in mitigation of damages.

Buchanan v. Atkinson, 3 Ky. Opin. 152.

Injury to character is the gravamen of an action for slander, and goodness of plaintiff's character may always be proven in aggravation, just as bad character may be shown in mitigation.

Denny v. Miller, 8 Ky. Opin. 144.

It is error for the trial court to permit witnesses, over objections, to give their opinion as to the effect of the speaking by appellant of slanderous

words, upon the character and feelings of plaintiff; but the witnesses should have been confined to the statement of facts, leaving the jury to form its own opinion as to their effect.

Denny v. Miller, 8 Ky. Opin. 144.

§ 104.—Intent and malice.

In a suit for slander it was error for the court to exclude evidence offered by the defendant showing that he had explained to some persons that the statements made by him were based upon the fact that another had been guilty of the offense; as such evidence would tend to show that defendant had no intention to injure the plaintiff and should have been allowed.

Denny v. Miller, 8 Ky. Opin. 144.

§ 111. Mitigation.

Damages in a slander suit may be mitigated by showing that the words spoken were mere repetition of the statements made by the plaintiff and repeated by the defendant, not in malice but believing them to be true.

Oliver v. Ewing, 9 Ky. Opin. 82.

(D) DAMAGES.

§ 120. Exemplary.

Where a defendant in a slander suit answers that the words spoken are true, and he fails in his proof, the jury may award punitive damages.

Callis v. Browning, 9 Ky. Opin. 878.

Punitive damages are always allowed in a suit for slander for damages to one's professional reputation, for the reason that no standard can be fixed by which to measure the damages that may be done to a professional reputation; and hence an instruction embodying such a principle is proper.

Branshaw v. Berry, 10 Ky. Opin. 918.

§ 121. Amount awarded.

In an action for slander, which was exceedingly aggravated, a verdict of \$8,000 for damages was held to be not so flagrantly excessive as to indicate passion or prejudice.

Dinslor v. Fresh, 2 Ky. Opin. 566.

(E) TRIAL, JUDGMENT, AND REVIEW.

§ 122. Conduct of trial.

Where in an action for slander the defendant confessed, by his answer, the allegations of the petition, that he had imputed to the plaintiff the crime of perjury; it is incumbent on him to make out the truth of his justification, and the exact form of the words containing the charge is immaterial; and under such state of facts the defendant is entitled to introduce his evidence and then to conclude the argument, and this order is not reversed because plaintiff introduced his evidence first.

Hensley v. Prince, 2 Ky. Opin. 325.

§ 123. Questions for jury.

Where an answer fails to deny the uttering of the words alleged, but avers that plaintiff had made statements prior to the taking of the deposition entirely different from the statements contained in the deposition, such statements should go to the jury on the ground of mitigation and not in justification.

Craycraft v. Ratcliff, 6 Ky. Opin. 635.

Where there is a contrariety of evidence in an action for slander, the question is one peculiarly within the province of the jury, and they should be instructed that if they believe, from the evidence, that plaintiff denied the malice, and truthfully explained the arrest, its manner, and the part he took in it, they should find for him.

Hensley v. Prince, 2 Ky. Opin. 325.

§ 124. Instructions.

Where, in an action for slander, words spoken after the commencement of suit, and which were then actionable, were stated in an amended petition, and the speaking of these words, as well as those spoken before the action was brought, were proven on the trial, the court erred in instructing the jury "that if they believed from the evidence that the defendant spoke the words charged in the amended petition they should find for the plaintiff."

Watt v. Whitlow, 1 Ky. Opin. 213.

Defendant in an action for slander, has a right to an instruction on the jury's belief of the evidence presented by him as to his justification, and if the jury should consider this as overbalancing plaintiff's evidence, they should find accordingly.

Hensley v. Prince, 2 Ky. Opin. 325.

In an action for slander, where the words alleged to have been spoken, were proved by some of the witnesses the court did not err in instructing the jury that if they believed from the evidence that appellant spoke the words charged in the petition of and concerning appellee, they must find for him.

Mayfield v. Crawford, 3 Ky. Opin. 440.

An instruction in an action for slander was properly refused which sought to withdraw from the consideration of the jury the testimony of witnesses who proved the speaking of the words, and which directed the attention of the jury to witnesses who heard the words spoken with accompanying explanations.

Mayfield v. Crawford, 3 Ky. Opin. 440.

An instruction in a slander case is correct which said to the jury that if the words were spoken without malice and in jest and were so understood by those who heard them, the law was for the defendant.

Croan v. Crenshaw, 8 Ky. Opin. 745.

When in defense of a slander suit the defense of justification is pleaded and relied upon, it is error for the court to charge the jury that if they believe the slanderous words were spoken they must find for the plaintiff unless they believe from the evidence beyond a reasonable doubt that the words spoken were true.

Ross v. Cunningham, 8 Ky. Opin. 793.

In a slander suit it is error for the court to charge the jury that if they believe that any of the actionable words charged were spoken maliciously they must find damages in plaintiff's favor, not exceeding the sum claimed by him; for, notwithstanding

the words were spoken, the defendant is entitled to overturn or rebut the charge that the words were spoken maliciously; since malice in an action of slander is an essential ingredient, and is a question of fact for the jury.

Goode v. Wall, 9 Ky. Opin. 887.

The question of malice is with the jury and not the court, and an instruction that malice is implied from certain proven facts is erroneous.

Sleodd v. Jessie, 10 Ky. Opin. 299.

V. SLANDER OF PROPERTY OR TITLE.

§ 139. Actions.

The slander of the title of appellant by appellee is a claim for unliquidated damages which can not be off-set against a claim on contract.

Deland v. Allen, 2 Ky. Opin. 224.

LICENSES.

I. FOR OCCUPATIONS AND PRIVILEGES.

§ 2. Power to license or tax.

§ 6.—Delegation of power.

§ 10. Subjects of license or tax.

§ 14.—Vehicles and means of transportation.

§ 16.—Dealings in particular articles.

§ 27. License fees and taxes.

§ 32.—Payment and collection.

II. IN RESPECT OF REAL PROPERTY.

§ 43. Nature of license in general.

§ 53. Transfer of rights.

§ 57. Revocation.

§ 59.—Right to revoke.

See Intoxicating Liquors, IV.

Brokers' license, see Brokers, § 3.

Peddlers' license, see Hawkers and Peddlers, § 2.

To keep tavern, see Intoxicating Liquors, § 59.

To manufacture and sell patented articles, see Patents, § 212.

To sell intoxicating liquors, see Intoxicating Liquors, IV.

Transfer of liquor license, see Intoxicating Liquors, § 103.

I. FOR OCCUPATIONS AND PRIVILEGES.

§ 2. Power to license or tax.

§ 6.—Delegation of power.

An occupation tax on attorneys at law, which is not shown to be disproportionate to that borne by tradesmen and professional men generally for the same purpose, is a legal exercise of the taxing power.

Woodruff v. City of Louisville, 6 Ky. Opin. 230.

§ 10. Subjects of license or tax.

§ 14.—Vehicles and means of transportation.

Under Act March 21, 1871, amending the city charter of Louisville, permitting it to impose a license on express companies for doing business in the city, the payment of \$1,000 state license fee as provided by Act March, 1870, does not exempt the express company from complying with the city ordinance imposing a license tax.

Adams Express Co. v. City of Louisville, 7 Ky. Opin. 355.

§ 16.—Dealings in particular articles.

The power to pass an ordinance to license and exact an annual tax from vendors of milk using a milk wagon or other vehicle for delivering their milk to customers in a city must be derived from a direct legislative grant; and the city of Lexington, not having received such a grant, has no power to pass such an ordinance.

Mayher v. City of Lexington, 10 Ky. Opin. 641.

§ 27. License fees and taxes.

In a suit for the restitution of license fee wrongfully collected, the petition is bad when it fails to allege that the general council enacted no other ordinance on the same subject, and that it failed to adopt and ratify the action of the inspector.

Adams Express Co. v. City of Louisville, 5 Ky. Opin. 198.

§ 32.—Payment and collection.

Where a city undertakes to grant a license, takes the money of the applicant for such license and agrees to issue one to him, but fails to do so, he may recover such money from the city.

City of Owensboro v. Elder, 11 Ky. Opin. 246.

II. IN RESPECT OF REAL PROPERTY.

§ 43. Nature of license in general.

A license from a stranger to enter on land is not a cause of action against the actual occupant, but is only matter of defense against an action for having entered.

Kelly v. Kelly, 1 Ky. Opin. 328.

§ 53. Transfer of rights.

A contract not in the nature of a lease, but in the nature of a license, imports trust and confidence in the exercise of rights by the licensee, and such rights can not be delegated or assigned as in case of an ordinary lease.

Thomas v. McGuire, 10 Ky. Opin. 633.

§ 57. Revocation.

§ 59.—Right to revoke.

Where one consents that another may so erect his house that the cornice hangs over the other's land, it amounts to a license, and when the owner of the building expends his money in its erection on the faith of the permission given, the other is estopped by his own act and will not be allowed to revoke such permission.

Jarvis v. Satterwhite, 11 Ky. Opin. 167.

LIENS.

§ 1. Nature and incidents in general.

§ 2. Creation by contract.

§ 3.—Express.

§ 7. Equitable liens.

§ 8. Statutory liens.

§ 11. Subject-matter to which lien attaches.

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§ 16. Waiver, loss or discharge.

§ 17. Enforcement.

§ 18.—In general.

§ 22.—Actions.

See Mechanics' Liens; Patents, X, C: Sales, § 82; Vendor and Purchaser, § 337.

Attachment lien, see Attachment, §§ 177, 178.

Attorney's lien, see Attorney and Client, IV, B.

Chattel mortgage lien, see Chattel Mortgages, § 133.
 Court officers have no lien for fees on subject-matter of litigation, see Counties, § 68.
 Extinguishment of lien, see Chattel Mortgages, § 133.
 For dower interest, see Dower, § 116.
 For improvements made by sub-lessee, see Landlord and Tenant, § 157.
 For labor and supplies to railroad, see Railroads, § 159.
 For money advanced, see Sales, VII, B.
 For municipal assessments, see Municipal Corporations, § 519.
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 For purchase-money at tax sale, see Taxation, § 740.
 For state taxes superior to lien for municipal assessment, see Municipal Corporations, § 268.
 Judgment liens, see Judgment, XV.
 Landlord's lien, see Landlord and Tenant, VIII, C, § 328.
 Mortgage lien, see Mortgages, III, D.
 Of agent, see Principal and Agent, § 90.
 Of attorney, see Attorney and Client, IV, B.
 Of bank on stock not paid for, see Banks and Banking, § 42.
 Of brokers, see Brokers, IV.
 Of creditor, see Assignments for Benefit of Creditors, § 334.
 Of execution, see Execution, IV, §§ 106, 107.
 Of garnishment, see Garnishment, V, § 112.
 Of levy of taxes for city purposes, see Municipal Corporations, § 975.
 Of partner on partnership real estate, see Partnership, § 309.
 Of purchaser at tax sale, see Taxation, § 732.
 On goods sold, see Sales, § 227.
 Priority between attachment liens, see Attachment, § 179.
 Priority between attachment lien and attorney's lien, see Attorney and Client, § 184.
 Priority between attachment and other liens, see Attachment, §§ 23, 180, 286.
 Priority between chattel mortgage and other liens, see Chattel Mortgages, § 138.

Priority of lien for money advanced over vendor's lien, see Sales, § 308.
 Priority of liens, see Attachment, §§ 178, 254.
 Priority of purchase-money mortgage, see Vendor and Purchaser, § 260.
 Tax liens, see Taxation, VI, § 509.
 Under bill of sale, see Sales, § 137.
 Vendor's lien, see Vendor and Purchaser, VI, A.
 Waiver of landlord's lien, see Landlord and Tenant, § 254.

§ 1. Nature and incidents in general.

A lien is a right to retain property until some charge upon it is paid, and may be legal or equitable; and the seller's lien upon goods for their price, is a legal lien and is founded on possession.

Davis & Co. v. Rice & Co., 4 Ky. Opin. 132.

An agreement by the owner, in a suit between the owner of a vessel and a lien holder, to recognize the existence of the lien and pay the same by way of compromise, does not admit the validity of such lien in an action for breach of covenants.

Porter's Admr. v. Castleman, 8 Ky. Opin. 19.

A lien good between the parties is good against purchasers from or creditors of the person creating the lien, where they have notice of it before they have acquired a legal right to the thing in lien or its proceeds.

Hoe & Co. v. Bullock, 10 Ky. Opin. 724.

§ 2. Creation by contract.

Where a lien has been created on goods by contract, purchasers of the goods will not be affected thereby in the absence of notice of the lien.

Morris v. Hayner & Dunlevy, 4 Ky. Opin. 556.

§ 3.—Express.

Where money is shown to have been borrowed to pay for the land sought to be subjected, and it was agreed that the lender should have a lien upon the land for its repayment, as between the parties the lender has such a lien as to deprive the borrower of his right to claim a homestead as against the debt.

Denny v. McAtee's Admr., 11 Ky. Opin. 194.

§ 7. Equitable liens.

Where one holds an equitable lien on property, no notice is necessary of same, to a purchaser of a subsequent and subordinate equity.

Cates v. Green, 4 Ky. Opin. 495.

Taxes are not debts, and the rule is not applicable that where one has a lien upon two funds and another has a lien upon only one of them the chancellor will require the first lienholder to exhaust his claim against the fund on which he has an exclusive lien before resorting to the other.

Husbands v. City of Paducah, 12 Ky. Opin. 201.

§ 8. Statutory liens.

The unpaid purchase money on land is prior to a widow's interest in her husband's real estate as devisee.

Payton v. Stagner, 2 Ky. Opin. 385.

The allegations of a petition, which are verified by oath and which are sufficient to authorize an attachment, creates a lien by statute from the time of the arrest of a defendant for robbery of the effects of appellant, and he could prosecute a civil action to enforce the lien.

Rhodus v. Ogg, 1 Ky. Opin. 436.

There is a most important distinction between equitable liens, to secure purchase money, where the legal title has been conveyed and where the legal title has been reserved until the purchase money has been paid. In the former case, he has parted with both the legal and equitable title; in the latter he retains the legal title as security for the purchase money.

Harlan's Admr. v. Brown, 1 Ky. Opin. 291.

A purchase money note, carrying specific instalments of interest to be paid, being secured by a lien on the land, the accrued interest thereon is an incident secured and protected by all safeguards which surrounds and secures the principal, and a lien attaches for such interest, though the principal be not due.

Tinsley v. Fielder's Admr., 2 Ky. Opin. 229.

Where certain specific creditors have by a special statute, liens on

steamboats for their debts, and for other debts of their owners the boats may be seized and sold under the general law on the subject; and a custom of a particular place which secures to creditors of the actual owners of steamboats preferred liens on such boats for the price of produce, or other articles sold to said owners, to be transported as freight, or to earn freight, is reasonable and just; while to make them liable by special lien, or otherwise, for the debts of persons not the owners, would be unreasonable.

Fowler-Mills & Co. v. Smedley, 2 Ky. Opin. 389.

The statutes give no lien on a steamboat to which goods and supplies are sold for speculation by the parties or to enable the boat to earn freight.

Fowler-Mills & Co. v. Smedley, 2 Ky. Opin. 389.

Where money is loaned for and applied to the business of manufacturing in which the debtor was engaged, it comes within the lien statute and is superior to the claim of an attaching creditor.

Goodnight v. Adsit, 11 Ky. Opin. 157.

§ 11. Subject-matter to which lien attaches.

The mere deposit of title papers can not create a lien or operate as a mortgage, as in England, to give one creditor preference over another.

Hughes v. Hughes, 5 Ky. Opin. 374.

§ 12. Priorities.

Although a bill of sale in which a lien has been reserved has not been recorded, it is superior to the lien of a subsequent mortgagee who had actual notice of the unrecorded lien.

Young & Reasor v. Henry, 2 Ky. Opin. 140.

Where the owner of a one-half interest in a saw-mill sold it, the purchaser assigning two notes to him and executing his own note to him for the purchase-money, and also executing a paper to him as follows: "And on this last note the said James W. Morford is to hold a lien on the mill until paid

for, and the aforesaid James O. Browning (purchaser) can not bargain and sell and give a clear title until all claims are settled," it is held that such a lien is superior to the claim of judgment creditors who purchased said interest after they had read the above named lien and had knowledge of said lien.

Morford v. Browning, 11 Ky. Opin. 186.

§ 16. Waiver, loss, or discharge.

The giving of a note for the interest on a lien, is not a new debt, but the legal inurement of the lien debt, and an endorsed credit, and the taking of personal security without other evidence of actual acceptance as partial payment, can not be considered as a release of the lien *pro tanto*.

Styles v. Riley, 4 Ky. Opin. 396.

Where the vendor releases his lien to enable the vendee to raise money by mortgage to pay on the property sold, while the lien can be enforced as against the vendee, it is effectually waived as against creditors or purchasers.

Carpenter's Exr. v. Kearns, 12 Ky. Opin. 9.

§ 17. Enforcement.

§ 18.—In general.

Where the allegations in an answer show that the defendant is seeking to enforce an agreement for payment of a lien owing on the same land, by one of the plaintiffs, it is improper to sustain a demurrer thereto.

Bowman v. Norton Bros., 3 Ky. Opin. 157.

It is error for the court to decree a sale of property covered by an alleged lien, where such lien is denied and not sufficiently proved.

Murphy v. Nelson, 1 Ky. Opin. 77.

In a suit to enforce a lien, and to enforce a specific execution of a contract, the plaintiff may perfect his title during the progress of the case.

Youell v. Gaines, 1 Ky. Opin. 163.

In a conveyance of lands, specifying partial payments, the express reservation of a lien as an indemnity for the

payment of one of the notes for unpaid purchase money, and the failure to make a similar provision for the other notes for which specific collateral of personalty was designated, is held to be a waiver of the lien on the estate conveyed as to the notes secured by collateral.

Tinsley v. Fielder's Admr., 2 Ky. Opin. 229.

Liens created by statute can not, as against creditors or innocent purchasers, be enforced, unless the statute has been complied with; and where no lien is reserved in a deed to secure the payment of interest on the balance of purchase money the vendor has no lien for such purposes.

Vincent v. Duff, 10 Ky. Opin. 560.

§ 22.—Actions.

Where there are senior and junior liens on the same real estate, and the senior lien holder sues to foreclose, the junior lien holders are entitled to be made parties if they ask to be, and may file cross-petitions to recover on their own liens, but they are not entitled to file answers to the petition of the senior lien holder and defend his suit.

Carrico v. Greenwell, 8 Ky. Opin. 293.

Where a plaintiff, having knowledge and notice of the character of another's lien, does not even aver that he is ignorant of the extent and nature of a defendant's lien, or that he has no lien or claim, such petition imposes no duty on the defendant to set up his lien, and a judgment on such a petition will not prevent such defendant lienholder from asserting his lien in another action.

Cubberly v. Lyons, 10 Ky. Opin. 712.

LIFE ESTATES.

§ 3. Creation and existence in general.

§ 17. Repairs and improvements.

§ 18. Taxes and assessments.

§ 23. Sales and conveyances by life tenants.

§ 27. Sale of property under order of court.

See Deeds, § 129; Dower; Homestead; Remainders; Wills, § 613. With power of sale, see Wills, §§ 613, 616.

§ 3. Creation and existence in general.

Where a testator gave to his daughter a certain share of his estate, providing that it should be held "her separate estate for her sole separate use and benefit, free from the control of her husband, James D. Blakely, or any liability for his debts, and at the death of said Virginia K. Blakely (said daughter), all of said property is to go to and belong to the heirs of her body," such language was held to give the daughter a life estate only, with remainder to her children.

Blakely v. Bryant's Admr., 12 Ky. Opin. 161.

Where one dies the owner in fee of real estate, leaving two children and a widow, and the land is partitioned between the children and the mother, and deeds are made, the grant to the widow, "Sarah Ann Moss, her heirs and assigns forever, during her life to have and to hold the same to Sarah Ann Moss, her heirs and assigns, forever," she takes a life estate only.

Moss v. Hunter, 12 Ky. Opin. 484.

§ 17. Repairs and improvements.

A tenant for life has no right to compensation for improvements made upon land in which he has only a life estate, and no recovery can be had by the tenant during his occupancy of the land or by his heirs or representatives after his death.

Butner v. Cook, 5 Ky. Opin. 195.

A tenant for life can not expend money in building upon the land, and charge it on the estate in remainder or make it a personal charge against the remainderman.

Johnson v. Stewart, 10 Ky. Opin. 270.

§ 18. Taxes and assessments.

The life tenant has the right to the enjoyment of the estate and is liable for the taxes on the estate, and the interest of the remainderman can not be sold for taxes until the estate of the life tenant is exhausted; and before the fee simple is liable for sale it must appear that the life estate is

insufficient, and that the life tenant has no other property out of which the taxes could be made.

Dumesnil v. City of Louisville, 11 Ky. Opin. 180.

§ 23. Sales and conveyances by life tenants.

Unsupported testimony of grantees of a life estate in land that they believed that the deed conferred on them the power to mortgage or sell the property, was held sufficient to rebut the presumption of fraud on their part in the sale of the property which they had no right to sell.

Weisenberger v. Groebe, 7 Ky. Opin. 72.

A life estate is restricted to the use of the donee, and can not be disposed of, even with a power conferred to "give to whom and when she pleases," to one of the residuary legatees exclusively; since the right to dispose of the estate, means so much thereof as may be consumed for the devisee's own use.

Price v. Gix, 2 Ky. Opin. 418.

Where a father conveys his real estate as a life estate to his son and fee simple to the children of the son, all for love and affection, and the son afterwards conveys such land back to the father, the father has only an estate for the life of his son and can convey no greater estate than he has.

Adkins v. Adkins, 13 Ky. Opin. 971.

§ 27. Sale of property under order of court.

Where an estate is held in trust for the life tenant, and the trustees have died and the life tenant brings suit for the sale and reinvestment of the proceeds of the land, the court will authorize the sale and reinvestment, upon the appointment and consent of the trustee of the property, and upon proof that it will be beneficial to the parties concerned.

Lowry v. Morgan, 6 Ky. Opin. 465.

Where real estate is held by one for life and by others in remainder, under a sale made for taxes, the purchaser can not hold the interest of the remaindermen, since the life tenant is alone liable for the taxes, and if the

purchaser at tax sale obtained any title it was but the life estate.

Ellis v. Hite, 10 Ky. Opin. 475.

Real estate in which a particular estate and remainder exists may be sold for reinvestment in other lands, although the power of alienation is forbidden, and this under the general principle that authorizes a trustee and life tenant to preserve the property; but such a sale can only be authorized when the facts are alleged in the petition and proved, showing that the sale will benefit the parties interested, but failure to make such allegations will not render the sale void.

Buddeke v. Clay, 12 Ky. Opin. 335.

LIFE TABLES.

Admissibility of, see Evidence, § 364.

LIMITATION OF ACTIONS.

I. STATUTES OF LIMITATION.

(A) NATURE, VALIDITY, AND CONSTRUCTION IN GENERAL.

- § 2. What law governs.
- § 4. Validity of statutes.
- § 5. Construction of limitation laws in general.
- § 10. Persons as against whom limitation is available.
- § 11. Limitation as against state, municipality, or public officers.
- § 12. Person who may rely on limitations.

(B) LIMITATIONS APPLICABLE TO PARTICULAR ACTIONS.

- § 19. Recovery of real property.
- § 20. Recovery of personal property.
- § 21. Contracts in general.
- § 22. Sealed instruments.
- § 23. Written contracts.
- § 25.—Instruments for payment of money.
- § 26. Oral contracts.
- § 27.—Express.
- § 29. Accounts.
- § 31. Injuries to the person.
- § 34. Liabilities created by statute.
- § 36. Equitable actions and remedies in general.

§ 37. Relief on ground of fraud or mistake.

§ 39. Actions or proceedings not specially provided for.

§ 41. Set-offs, counterclaims, and cross-actions.

II. COMPUTATION OF PERIOD OF LIMITATION.

(A) ACCURAL OF RIGHT OF ACTION OF DEFENSE.

- § 43. Causes of action in general.
- § 44. Title to or possession of real property.
- § 46. Contracts in general.
- § 48. Instruments for payment of money.
- § 55. Torts.
- § 60. Equitable actions and remedies.

(B) PERFORMANCE OF CONDITION, DEMAND, AND NOTICE.

§ 66. Demand.

(C) PERSONAL DISABILITIES AND PRIVILEGES.

- § 72. Infancy.
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- § 74. Insanity or other incompetency.

(D) DEATH AND ADMINISTRATION.

§ 83. Death of person liable.

(E) ABSENCE, NON-RESIDENCE, AND CONCEALMENT OF PERSON OR PROPERTY.

- § 85. Departure after accrual of cause of action.
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(F) IGNORANCE, MISTAKE, TRUST, FRAUD, AND CONCEALMENT OF CAUSE OF ACTION.

- § 95. Ignorance of cause of action.
- § 98. Fraud as ground for relief.
- § 99.—In general.

(H) COMMENCEMENT OF ACTION OR OTHER PROCEEDING.

- § 115. Mode of computation of time limited.
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- § 127. Amendment of pleadings.

III. ACKNOWLEDGMENT, NEW PROMISE, AND PART PAYMENT.

- § 140. Acknowledgment or new promise.
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IV. OPERATION AND EFFECT OF BAR BY LIMITATION.

§ 165. Operation as to rights or remedies in general.

§ 171. Persons to whom bar is available.

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 176. Pleading in anticipation of defense.

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§ 186. Pleading in avoidance of defense.

§ 192.—Matters avoiding bar of statute.

§ 193. Issues, proof, and variance.

See Curtesy; Laches; Mortgages, § 425; Trusts, § 17.

Action for relief from fraud, see Fraud, § 38.

Action on account between landlord and tenant, see Landlord and Tenant, § 227.

Action on bond, see Principal and Surety, § 149.

Action on continuing trust, see Principal and Surety, § 190.

Action to set aside fraudulent conveyances, see Fraudulent Conveyances, § 248.

Concealment as affecting running of statute, see Fraud, § 38.

Of action against corporation, see Corporations, § 504.

Plea of limitations, see Principal and Surety, § 137.

Pleading statute against cestui que trust, see Trusts, § 365.

Set-off, see Set-off and Counterclaim, § 1.

Sufficiency of acknowledgment to take accounts out of statute, see Account, § 19.

When statute begins to run against married women, see Husband and Wife, § 220.

I. STATUTES OF LIMITATION.

(A) NATURE, VALIDITY, AND CONSTRUCTION IN GENERAL.

§ 2. What law governs.

The law of this state governs when a suit is brought here on a note executed in Ohio, as to whether our statute of limitations applies.

Ehrman v. Stoll, 10 Ky. Opin. 592.

§ 4. Validity of statutes.

A retrospective limitation to actions, allowing reasonable time to sue, does not either impair the obligation of contracts or divest any vested right.

Stewart v. Finch, 3 Ky. Opin. 585.

§ 5. Construction of limitation laws in general.

The effect of Act February 12, 1869 (1 Sess. Acts 1869-72), was not to revive and give effect to fee bills which under existing law had ceased to be collectible, but the legislative intention was to extend the period within which fee bills not already barred might be enforced.

McAlister v. Carmen, 6 Ky. Opin. 72.

The statutory bar had become complete before the act was passed, and it is not to be assumed that the legislature intended to revive rights barred at the time of the enactment.

Hamilton v. Barnes, 5 Ky. Opin. 167.

The statutory bar provided for by chapter 63, Rev. Stat., did not embrace a pre-existing cause of action.

Mattingly v. Helm, 1 Ky. Opin. 582.

§ 10. Persons as against whom limitation is available.

Where the commonwealth having a judgment, with an execution returned no property found against C, seeks by equitable action to subject a debt owing by H to C, its debtor, to the satisfaction of that debt, and the statute of limitation having been pleaded by appellee, and court below adjudged the debt of H to C barred; whatever would bar C would bar the Commonwealth.

Commonwealth v. Cromwell's Admr., 4 Ky. Opin. 275.

A substitution of new notes for old ones, where none of the principal is paid, is a continuance of the loan, and the statute of limitations will not bar a recovery of any usury paid thereon.

North v. Haggin's Admr., 2 Ky. Opin. 474.

Gen. Stats. 1883, art. 6, § 3, provides that a surety for an executor, administrator, guardian or curator, or sheriff to whom a decedent's estate has been transferred, is discharged from liability to a distributee, devisee or ward when no suit is brought within five years after the cause of action accrues, and after the distributee, or ward, attains the age of twenty-one years.

Willson v. Hodge's Gdn., 13 Ky. Opin. 895:

§ 11. Limitation as against state, municipality, or public officers.

Where the state is a partner in an enterprise with other stockholders to erect and maintain a bridge, and there is a promise that the stock should be repaid before any dividends should be paid on the original stock, the other stockholders will not be allowed to hold the money by pleading, through the corporation, the statute of limitations.

Bardstown & Louisville Tpk. Co. v. Commonwealth, 11 Ky. Opin. 516.

The five year statute of limitations applies to the state the same as to an individual, and will be held as a bar to an action brought by the state against a city to recover a debt.

Commonwealth v. City of Lexington, 13 Ky. Opin. 184.

The statute of limitations runs against the state the same as against a natural person.

Camerson v. Beatty, 13 Ky. Opin. 242.

§ 12. Person who may rely on limitations.

The statute of limitations will run in favor of a surety.

Kender's Admr. v. Taber, 1 Ky. Opin. 412.

(B) LIMITATIONS APPLICABLE TO PARTICULAR ACTIONS.

§ 19. Recovery of real property.

Where A purchased of B certain land upon which B had given a mortgage, a payment having been made to B by A, and B executed a bond for title to indemnify A against eviction under the mortgage and to convey the land upon payment of the mortgage debt, and the mortgage was never paid, and A was evicted, as there was no breach of the bond, the statute of limitations did not begin to run until after the eviction.

Huff v. Beall & Rachford, 1 Ky. Opin. 49.

The statute of limitations, limiting the right of entry to fifteen years, will not bar an action for recovery of land, in a suit between conflicting patents, and will not begin to run until after the junior patent has been actually obtained, since the plaintiff would have no right of entry or cause of action until so obtained.

Devaxhler v. Buford, 2 Ky. Opin. 612.

Where lapse of time and the statute of limitations are relied on as a bar to an action to recover possession of land, the plaintiff will be presumed to have notice of the adverse holding from the time of the registration of the deed.

Feland v. Braxdale, 2 Ky. Opin. 673.

Where a widow has only a life estate in real estate, without power to sell, the statute of limitations only begins to run against the owners of the fee, after the death of the widow.

Creason v. Harrington, 8 Ky. Opin. 48.

The statute of limitations does not run in favor of a tenant in possession of real estate, unless the tenant in some way refuses longer to acknowledge his landlord as the owner of the land and claims it as his own, and knowledge is brought to the landlord of such claim.

Gresham v. Broughton, 9 Ky. Opin. 14.

The statute of limitations is a bar to a claim to real estate, where the

party claiming that she was induced to part with it through fraud first petitions to be made a party to a pending suit concerning it, more than five years after the action was begun, more than five years after she discovered the alleged fraud by which she was induced to sign the deed, and more than ten years after the deed was signed.

Graves v. Trimble's Assignee, 10 Ky. Opin. 893.

Where a husband was a tenant by the curtesy, no action could be maintained for the recovery of the land until his death, and where his death occurred in 1877 the statute of limitations against such an action then began to run.

Goodin v. Goodin, 11 Ky. Opin. 218.

Fifteen years bars a suit for the recovery of land after the right of action accrues, and if the party wishing to recover is an infant he has three years after his disability is removed in which to bring the action; and where parties are infants at the expiration of the fifteen years period, but fail to bring action thereafter for ten years after their disability is removed, their cause is barred by the statute.

Godsey v. Robinson, 12 Ky. Opin. 55.

§ 20. Recovery of personal property.

The neglect to claim an interest in personal property for a period of 20 years will bar a subsequent recovery by the heirs of the claimant.

Todd's Admr. v. Todd's Admr., 3 Ky. Opin. 110.

§ 21. Contracts in general.

Lapse of time can not operate as a statutory bar to an action on a note, its only legal effect being presumptive evidence of payment as pleaded, and payment not pleaded can not be presumed.

Wintersmith v. Wintersmith's Admx., 2 Ky. Opin. 560.

The statute of limitations will run and is a bar to a recovery by a guardian on a contract made with him for the benefit of his wards.

Hummer v. Orndorff's Exr., 12 Ky. Opin. 644.

§ 22. Sealed instruments.

Where a mortgage was enforceable as early as 1838 and more than thirty-three years elapsed before any suit was begun to foreclose it, the statute of limitations is a good defense to such action.

Woodson v. Tuggle, 9 Ky. Opin. 47.

Under § 2, art. 6, ch. 71, Gen. Stat., sureties on a bond given in the course of a judicial proceeding are discharged from liability, unless suit be brought within seven years after a right of action accrues.

Murphy v. Isaacs, 9 Ky. Opin. 799.

§ 23. Written contracts.

The limitation of seven years in favor of a surety will not apply where an execution against the surety alone was issued within the statutory period.

Frederick v. Bethurem, 4 Ky. Opin. 369.

Where more than three years had elapsed from the payment of the debts before the administrator made an effort to reclaim the usury included in the notes, the plea of the statute of limitations is a complete bar.

Bowman v. Bowman's Admr., 5 Ky. Opin. 205.

§ 25.—Instruments for payment of money.

In an action on a judgment rendered in another state, the statute of limitations can not be made available upon demurrer, unless the petition shows not only sufficient lapse of time, but also the non-existence of any ground of avoidance.

Tibbetts v. Summers, 7 Ky. Opin. 350.

Where the holder of a note fails to bring suit upon same during the life of the obligor, he is ordinarily held to be guilty of negligence; but where the legislature suspends for a given period all laws requiring circuit courts to be held for the trial of causes, and during this suspension the obligor dies, the holder of the note is not held to be guilty of negligence, and a lack of diligence in prosecuting his cause, should he fail to bring an action on

the note until after the death of the obligor.

Branaugh & Son v. Mills, 1 Ky. Opin. 627.

Where more than fifteen years have elapsed from the time a cause of action accrued on a judgment, and no execution has been issued, the statute of limitations is a bar to the action, since a judgment operates as a lien upon the estate of a defendant, and upon the failure to issue an execution for a period of five years the lien terminates until there is a revivor, so that it may operate as a lien on the estate of the debtor, and the new order of revivor constitutes no cause of action.

McArthur v. Goddin, 12 Ky. Opin. 518.

§ 26. Oral contracts.

§ 27.—Express.

A claim by one legatee under a will against another legatee, who took possession of the estate, not as executor, and the whole estate amounts to no more than \$150, which was all expended in having tombstones placed over the graves of his mother and father as directed by the will, can not be maintained, even where the one in possession promised to pay to claimant the value of his interests, where the claim is not asserted for more than thirty years after the will was probated.

Threlkeld v. Duerson's Admr., 10 Ky. Opin. 753.

§ 29. Accounts.

Where ten years have elapsed since the sale of a horse and the institution of an action to recover the purchase-price, a plea of limitation is a bar to the action.

Long v. Duvall, 7 Ky. Opin. 453.

§ 31. Injuries to the person.

The statute of limitations begins to run against an action for personal injuries on the day of the injury, and the fact that plaintiff did not discover the extent of his injuries until several months thereafter can not relieve him from the operation of the statute.

Welsh v. Louisville, C. & L. R. Co., 6 Ky. Opin. 330.

§ 34. Liabilities created by statute.

The running of the statute of limitations against the collection of taxes may be prevented by relisting delinquent taxes regularly by the proper officer.

Cummins v. Clark, 10 Ky. Opin. 83.

The collection of taxes may be barred by the statute of limitations.

Cummins v. Clark, 10 Ky. Opin. 83.

§ 36. Equitable actions and remedies in general.

It is a well settled rule that limitations will not run, as a general rule, against an express trust.

Masonic Temple Co. v. Ward, 2 Ky. Opin. 378.

Where property is held under an express or implied trust, which would not accrue until the death of the grantor and there is a refusal to fulfil the trust, neither a statutory nor presumptive bar will apply.

Davis v. Higgenbotham, 2 Ky. Opin. 550.

Where a trustee of an express trust is required by the trust to take and hold property and pay the interest received thereon to a named person, and executes a bond for the faithful performance of his duties, but converts the trust estate to his own use, and dies, the person appointed to succeed him may bring an action on such bond to recover the estate; and, in such case the cause of action never accrued to the beneficiary of the trust so as to enable her to recover the principal, and for this reason the statute of limitations can not apply to bar the right of recovery.

Harris v. Doyle's Trustee, 9 Ky. Opin. 327.

The statute of limitations is a complete bar to an action to set aside a deed for fraud, where the deed was made and delivered more than ten years before the suit was commenced.

Morton v. Cromwell, 9 Ky. Opin. 383.

When a party comes into a court of equity to recover an old stale demand which is barred at law, and the proof is reasonably clear that he is not en-

titled to it, equity should refuse him relief.

Hamlin v. Thompson, 9 Ky. Opin. 530.

Where one is trustee for another under the terms of a will, which trust is to terminate at the death of a named person, upon her death, the trust terminates, and it becomes his duty to turn over to those entitled thereto the remainder of the estate; and he is in no sense a trustee of a continuing trust as to those entitled to the estate, and hence the statute of limitations begins to run as to their claims against him from the death of the beneficiary of his trust, and their claims will be barred unless asserted within the time named by the statute.

Bigham v. Hodge's Exr., 10 Ky. Opin. 351.

§ 37. Relief on ground of fraud or mistake.

Under § 5, art. 3, ch. 63, R. S., an action will not be allowed for relief from a fraud committed more than ten years prior to the institution of the suit.

McCullon v. Robinson's Admr., 7 Ky. Opin. 199.

Any action of fraud is barred by the statute of limitations after five years from the date a plaintiff becomes twenty-one years of age, and where a plaintiff who became of age in 1870 does not institute an action for fraud alleged to have been perpetrated in 1851 until 1881 her proceeding is barred by the statute.

Poole v. Allinsworth, 13 Ky. Opin. 279.

§ 39. Actions or proceedings not specially provided for.

Where a devisee has refused to qualify, thought appointed executor, and without administration takes the estate into his hands, he can not rely on the statute of limitations to defeat a claim of another legatee against him for his portion of said estate.

Mason's Admx. v. Mason, 11 Ky. Opin. 345.

While a conveyance by a debtor, without consideration, is declared void as to existing creditors, the statute of limitations applies, and an ac-

tion to set aside such a conveyance can not be maintained unless begun within five years after the right of action accrues.

Cotton v. Brown, 11 Ky. Opin. 573.

§ 41. Set-offs, counterclaims, and cross-actions.

The statute of limitations does not run against actual payment or expected set-off.

Wintersmith v. Wintersmith, 3 Ky. Opin. 406.

The statutes of limitation may run against a set-off, but not against a counterclaim.

Thurmond v. Black, 2 Ky. Opin. 67.

Where a set-off or counter-claim is barred by the statute of limitations, before one can recover upon it he must allege and prove a promise to pay after the running of the statute, and his set-off or counter-claim must be based upon the new promise; and there appears no good reason why he may not plead the new promise in a reply, as he is not bound in filing his set-off or counter-claim to anticipate that a plea of the statute of limitations will be interposed.

Everett v. Simms, 10 Ky. Opin. 75.

II. COMPUTATION OF PERIOD OF LIMITATION.

(A) ACCRUAL OF RIGHT OF ACTION OR DEFENSE.

§ 43. Causes of action in general.

The statute of limitations does not begin to run until a right of action accrues.

Curlin v. McCrocklin, 9 Ky. Opin. 314.

§ 44. Title to or possession of real property.

Under ch. 63, R. S., 1865, limiting the right of action relating to real estate to fifteen years, but reserving to persons under disability three years after the removal of disability to commence action, an infant who did not commence action within three years from the time of his arrival at age is barred from maintaining an action.

Dugan v. Robinson. 6 Ky. Opin. 354.

Where M abandoned a farm, the estate being left in the hands of McD, the other partner, as the possession of McD was not unfriendly to M no cause of action could accrue in favor of M until the character of the holding was charged.

McDaniel v. Mattingly, 4 Ky. Opin. 404.

Where defendants have been in the adverse possession of land for more than fifteen years next before they were sued, and the plaintiffs were not laboring under disability when the cause of action accrued, the statute of limitations begins to run from the time the action accrues.

Bingham v. Orr, 11 Ky. Opin. 169.

Where one placed his son-in-law in possession of land, and the son-in-law sets up a claim to the land as a gift under parol, and the father-in-law sues for the land, to which the statute of limitations is pleaded, and it appears from the evidence that the donee looked to the donor for title and had sought to procure title from him, and continued to try to procure such title up to a year before the suit was brought, the transaction was nothing more than an unexecuted gift, and so long as the donee looks to the donor for title, the holding is not adverse and the statute of limitations will not run and is no defense.

Strother v. Cymes, 12 Ky. Opin. 173.

Where a proceeding is begun to foreclose a mortgage before barred by the statute of limitations, the cause of action is not barred by the statute merely because the petition was not sufficient and had to be amended and the amendment was not filed until more than fifteen years after the cause arose, since the filing of an amended petition is not the beginning of a new action.

Jones v. Scott, 12 Ky. Opin. 583.

§ 46. Contracts in general.

Under a contract to support a woman and her children, a cause of action to recover the value of the support does not accrue until the party refuses to longer support her, and the statute of limitations in such a case

begins to run from the time of refusal to furnish such support.

Osborn v. Osborn, 12 Ky. Opin. 361.

§ 48. Instruments for payment of money.

Where a note was satisfied and cancelled by acceptance of other notes payable by different parties, the right of action to recover usurious interest on the first note accrued, and limitation began to run from the date of satisfaction of the first note.

Martin v. Reed & Thompson, 7 Ky. Opin. 370.

In case the evidence in a suit on a note shows a payment after the note became due, the plea of the statute of limitations was properly held to be unavailing, although more than fifteen years had elapsed since the note became due, because fifteen years had not expired from the date of the last payment.

Johns v. Martin's Admr., 11 Ky. Opin. 109.

Where fraud in procuring the execution of a note is not discovered until 1877, although more than five years may have elapsed from the date of the first payment made on the note, still the statute of limitations will not avail as a defense.

Davis v. Davis' Admr., 12 Ky. Opin. 550.

§ 55. Torts.

To suspend the operation of the statute of limitations against an action for personal injuries, plaintiff should have alleged and proven facts showing either that the defendant had prevented him from suing, or by agreement, contract, or understanding had induced him to refrain from bringing suit.

Welsh v. Louisville, C. & L. R. Co., 6 Ky. Opin. 330.

§ 60. Equitable actions and remedies.

Where a mistake is made in a deed the statute of limitations will not begin to run until the mistake is discovered, provided it is discovered and the suit brought within ten years after the mistake occurred, but where more than ten years elapses between a mistake and the filing of a suit it becomes

immaterial when the mistake was discovered.

Gorham v. Powell, 9 Ky. Opin. 397.

An action to set aside a conveyance must be brought within five years from the date the cause of action accrued, and where a deed is procured by fraud and the petition alleges it, in the absence of allegation and proof to the contrary, it will be regarded that the fraud was discovered and the cause of action consequently to have accrued at the date of the deed.

Osborn v. Osborn, 12 Ky. Opin. 361.

An action for relief from fraud or mistake must be brought within five years after the right of action accrues, but such a cause of action does not accrue until the discovery of the fraud or mistake; but no such action can be brought ten years after the making of the conveyance or the perpetration of the fraud.

Counts v. Kitchen, 12 Ky. Opin. 695.

(B) PERFORMANCE OF CONDITIONS, DEMAND, AND NOTICE.

§ 66. Demand.

When no demand is made on a claim for fifteen years, during all of which time the alleged debtor was solvent, and no explanation is given for such delay, it affords strong evidence of the non-existence of such claim.

White v. Bolton, 9 Ky. Opin. 453.

(C) PERSONAL DISABILITIES AND PRIVILEGES.

§ 72. Infancy.

Though at the time the right of action accrued, two of the plaintiffs were infants, and more than three years elapsed after their disability was removed before the action was begun, they lost their remedy.

Feland v. Goode, 3 Ky. Opin. 159.

Where the right to redeem land was in the wife and the husband as tenant by curtesy and the wife died before the expiration of the term for redemption leaving as her only heir an infant, the right of redemption passed to the

heir and the heir's infancy prevented the running of the statute of limitations.

Henry v. Jones, 5 Ky. Opin. 378.

If at the death of an ancestor all of his heirs are under legal disabilities they may have the time allowed after the removal of such disabilities from all to bring their action or make their entry; but if one of the heirs is not under disability at the death of the ancestor, or when the right of action accrued, the disabilities of the other heirs will not prevent the statute of limitations from running nor bring any of them within its saving.

Collier v. Davis, 12 Ky. Opin. 100.

The statute of limitations will not run against an infant, and the fact that such infant has a guardian will not change the fact.

Willson v. Hodge's Gdn., 13 Ky. Opin. 895.

§ 73. Coverture.

Where the statute of limitations has begun to run against a woman, her subsequent marriage will not arrest its running, the rule being that if limitation begins to run its running will not be suspended by a subsequent disability which is self-imposed.

Field v. Klete, 10 Ky. Opin. 360.

The statute of limitations does not begin to run as against a widow's claim of dower until by reason of her husband's death she is entitled to assert it.

Smith v. Meyers, 13 Ky. Opin. 830.

§ 74. Insanity or other incompetency.

Where one is of unsound mind when a cause of action accrues to him but thereafter is restored to his reason and remains sane for a long period of time, knowing that he has a cause of action, if he takes no steps to recover his rights, and thereafter again becomes insane, the statute of limitations will run against him.

Duncan v. Vick, 13 Ky. Opin. 1075.

If a person is of unsound mind when a cause of action accrues to him, the limitation does not begin to run until three years after his restoration to his proper mind, and when a person has been once found to be of unsound

mind, the law presumes that this condition continues.

Duncan v. Vick, 13 Ky. Opin. 1075.

(D) DEATH AND ADMINISTRATION.

§ 83. Death of person liable.

More than four years had expired after the death of the ancestor before this suit was brought against her heirs; and consequently, the saving provided for in the statute of limitations was lost; however, if suit had been brought within two years after the death of intestate the statute of limitations would not have been available as a bar, except as to so much of the account as was barred by time at the death of intestate.

Crenshaw v. Western Lunatic Asylum, 4 Ky. Opin. 169.

(E) ABSENCE, NON-RESIDENCE, AND CONCEALMENT OF PERSON OR PROPERTY.

§ 85. Departure after accrual of cause of action.

The absence of plaintiff in the Confederate army was held not to prevent the running of the statute of limitations.

Everitt v. Blackburn, 6 Ky. Opin. 277.

If appellee left the state of Arkansas before the statutory bar became complete and became a resident of Kentucky, he can not avail himself of our statute, until he has resided here the full term of five years after giving our courts jurisdiction of his person.

Kitnel v. Higgins, 5 Ky. Opin. 500.

Where a suit is brought on a note more than fifteen years after the date of the last payment on it, and where the defendant a part of the time resided out of the state, but made frequent visits back home, where plaintiff might have sued her, her removal from the state did not suspend the running of the statute of limitations.

Dixon v. Wallace, 8 Ky. Opin. 276.

§ 86. Non-residence.

Where a right of action accrued in 1864, and the defendant left the state in 1866 and became a non-resident, the

statute of limitations will not run in his favor while absent, and his occasional return for temporary purposes, without the knowledge of plaintiff, will not change the rule.

Hines v. McCormick, 8 Ky. Opin. 123.

(F) IGNORANCE, MISTAKE, TRUST, FRAUD, AND CONCEALMENT OF CAUSE OF ACTION.

§ 95. Ignorance of cause of action.

Where appellee was the owner of a tract of land in H county in his own right, and he exchanged this land for other land, and caused a deed to be made to his wife at a time when he was insolvent, and after the creation of appellant's debt; and the deed to B was recorded in H county court more than five years before the institution of this suit; the appellant knew of the existence of this fraud more than five years before he brought his suit, and the statute of limitation relied on by appellee is a bar to his recovery.

Beagle v. Bradle, 4 Ky. Opin. 676.

Though the limitation of five years for filing suit, after judgment rendered, for setting same aside, has expired, the statute will not begin to run, until after the actual time of discovery of the cause of action thereon, and a demurrer to such petition should not have been sustained.

Crittenden's Heirs v. Bush, 3 Ky. Opin. 192.

Ignorance of one's right will not prevent the statute of limitations from running, and the plea of the statute will not be defeated for no other reason than that the party supposed if he sued he could not recover.

Commissioners of Sinking Fund v. McDowell, 13 Ky. Opin. 195.

§ 98. Fraud as ground for relief.

§ 99.—In general.

In a charge of fraud the statute of limitations begins to run only from the time of the discovery of the fraud.

Mason v. Commonwealth, 13 Ky. Opin. 93.

The fact that a plaintiff does not discover a fraud until just before he begins his action for relief against it

is not sufficient to defeat the defense of the statute of limitations, but he must be able to show that he could not sooner have discovered the fraud by the use of ordinary diligence.

Zachary's Admr. v. Hicks, 13 Ky. Opin. 1031.

Actions for relief on the ground of fraud or mistake must be commenced within five years next before the cause of action accrues, and the cause accrues upon the discovery of the fraud or mistake; but in no case can an action of this character be begun after ten years from the date of the perpetration of the fraud.

Zachary's Admr. v. Hicks, 13 Ky. Opin. 1031.

(H) COMMENCEMENT OF ACTION OR OTHER PROCEEDING.

§ 115. Mode of computation of time limited.

The statute of limitations continues to run until an action is commenced in a court having jurisdiction.

Hulings v. Martin, 8 Ky. Opin. 320.

§ 117. Proceedings constituting commencement of action.

§ 118.—In general.

Where a petition was filed, setting out both an action on the case for consequential damages, and against the bond, for a wrongful levy, after attachment issued, and an amended petition was filed, asking judgment on the bond alone; as the original petition sued for the tort as well as for the breach of contract, the filing of the amended petition some time afterwards was not the commencement of the action for tort, and limitations did not apply.

Clayton v. Hamilton, 4 Ky. Opin. 510.

The beginning of an action in a county where defendant does not live and the service of process on him in a county where he lives, other than the county in which the action is brought, gives the court no jurisdiction, and the commencing of such an action will not prevent the statute of limitations from running.

Hulings v. Martin, 8 Ky. Opin. 320.

§ 127. Amendment of pleadings.

Limitation does not run against an amended petition which only supplies a defect in the original, as the original was not barred by time.

Caldwell, Hunter & Co. v. Dawson, 2 Ky. Opin. 100.

Where a suit is filed before barred by the statute of limitations and the petition is amended after a time when the original action would have been barred, the plea of the statute of limitations can not be maintained where such amendment does not declare upon a new cause of action.

Geoghegan's Exr. v. Hillson, 8 Ky. Opin. 787.

III. ACKNOWLEDGMENT, NEW PROMISE, AND PART PAYMENT.

§ 140. Acknowledgment or new promise.

A mortgage executed by a majority of the trustees of the church is not only a direct recognition of the debt, but is an unconditional promise to pay it, and the statute of limitations can not be made available as a bar to recovery.

Trustees of North Episcopal Church v. Chambers, 5 Ky. Opin. 346.

In order to take a case out of the statute of limitations, an express acknowledgment of the debt as a debt due at that time (coupled with the original consideration), or an express promise to pay it, must be proved to have been made within the time prescribed by the statute.

Boone v. Clarkson, 2 Ky. Opin. 601.

The rule, as to the taking of a case out of the statute of limitations, should never be extended beyond its letter, and therefore none but an express acknowledgment of the subsistence of the debt, from which it may be reasonably inferred that the party making it intends to pay the debt, will be sufficient.

Boone v. Clarkson, 2 Ky. Opin. 601.

When an action on a bill of exchange is barred by limitation, which

is pleaded, and a subsequent promise to pay is relied on it must be alleged, and the statement that one deems himself bound for the debt can not be construed to be an unconditional promise to pay.

Butler v. Knott & Dunham, 2 Ky. Opin. 79.

A new promise made within five years before the commencing of an action will take the case out of the statute of limitations.

Ellis v. Sanders, 3 Ky. Opin. 499.

§ 141.—Nature in general.

Where a claim is barred by the statute of limitations, evidence of a new promise to pay the debt is held to be a failure of proof.

Riley v. Hines' Curator, 11 Ky. Opin. 87.

§ 145.—Form and requisites in general.

There can be no recovery upon a debt upon a new acknowledgment of indebtedness after the debt has been barred by the statute of limitations; but the moral obligation to pay the debt will furnish the consideration of a new promise.

Cassell's Heirs v. Gazello's Exr., 8 Ky. Opin. 384.

§ 149.—Qualifications and conditions.

Where the only issue submitted by the pleadings is as to whether the defendant in the action, subsequent to his discharge in bankruptcy, promised to pay the debt sued on, an instruction is erroneous which instructs the jury to find for the plaintiff upon the hypothesis that the promise made was to pay the debt when he was able, for under the averments of the petition it was incumbent on the plaintiff to have proved an express and unconditional promise to pay the debt; and as the promise pleaded was unconditional, the plaintiff was not entitled to a verdict upon the proof of a conditional promise.

Martin v. Ferguson, 11 Ky. Opin. 351.

§ 152. Part Payment.

Where a bank did not, within seven years after a cause of action accrued on a note, appropriate a balance of the maker's money to the payment of

the note, the plea of limitation is a bar to an action thereon.

Commonwealth v. Page, 5 Ky. Opin. 190.

The statute of limitations can not be invoked to escape liability by one who, within the five years prior to the beginning of the action, has recognized his obligation to pay and made payments thereon.

Commonwealth v. Demaree, 8 Ky. Opin. 11.

Where fifteen years and one month have elapsed from the date of the last credit on a note and a plea of the statute of limitations is set up, the burden is on the plaintiff to avoid the operation of the statute.

Dixon v. Wallace, 8 Ky. Opin. 276.

IV. OPERATION AND EFFECT OF BAR BY LIMITATION.

§ 165. Operation as to rights or remedies in general.

After more than three years has elapsed since a final judgment in favor of an appellee, and the statute of limitations is relied on, the bar is complete.

Doom v. Doom, 3 Ky. Opin. 441.

§ 171. Persons to whom bar is available.

Where a creditor in attempting to make his debt, at the instance and solicitation of his debtor, pursues other creditors for a number of years, the statute of limitations, as to the original note of his debtor, would not begin to run till that remedy had been exhausted.

Crow's Admr. v. Bush, 3 Ky. Opin. 463.

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 176. Pleading in anticipation of defense.

§ 178.—Sufficiency of allegations in general.

In order for a plea of limitations to be good, the pleader must aver facts showing that the cause of action sued upon accrued more than the statutory period before the commencement of the action.

Kester v. Whitaker, 8 Ky. Opin. 499.

To be good, a plea of the statute of limitations must contain a statement of the facts relied upon in order to enable the court to say whether it constitutes a defense, as well as to enable the adverse party to know how to prepare to meet it.

Mitchell's Admr. v. Dunevant, 9 Ky. Opin. 362.

§ 179.—Matters avoiding bar of statute.

Where a defendant to an action for injunction against the issuance of an execution relies upon the non-intercourse proclamation of the President of the United States, dated August 16, 1861, as an excuse for his failure to have execution, he must show clearly that he was a resident of a state in rebellion at the time the proclamation was issued, since a pleading is to be taken most strongly against the pleader.

Lynn v. Lynn, 8 Ky. Opin. 70.

§ 180. Demurrer or motion raising defense.

The statute of limitations is a matter of defense, and if relied upon must be pleaded by the defendant, and unless the petition shows on its face not only that the action is barred by him, but that the defendant is not within any of the exceptions mentioned in the statute, a demurrer will not be sustained to it.

Hosick v. Trabue, 8 Opin. 805.

The statute of limitations must be set up if relied upon by plea and can not be taken advantage of by demurrer where the only defect in plaintiff's petition is that his cause is barred by time.

Smith v. Calvin, 8 Ky. Opin. 808.

§ 181. Pleading statute as defense.

A reply to a plea of limitations is only permitted where there is a counterclaim or set-off by the defendant in his answer.

Slack v. Rowihac, 5 Ky. Opin. 101.

§ 183.—Sufficiency of denials and allegations.

An answer stating that the defendant relies upon the statute of limitations is not sufficient, but to get the advantage of such statute the facts

must be pleaded showing that the cause is barred by the statute.

Woodward v. Endees' Exr., 12 Ky. Opin. 427.

A plea that the defendant "also pleads and relies on the statute of limitations as by law provided, as a bar to this action of plaintiff, and says plaintiff's right of action, if any he had, or has, is barred by lapse of time," is not a good plea of the statute of limitations, but is defective, and appellant should have required it to be made more specific, and where he does not make such a motion in the trial court, he can not raise such question in this court.

Hutchings v. Frazer, 13 Ky. Opin. 143.

§ 186. Pleading in avoidance of defense.

§ 192.—Matters avoiding bar of statute.

Where the statute of limitations is pleaded as a defense, and a new promise in avoidance is relied upon, it must be alleged, in the original or an amended petition, if the new promise was made after the limitation was complete, for the reason that it is a new cause of action and must be declared upon as a basis to authorize proof upon it.

Riley v. Hines' Curator, 11 Ky. Opin. 87.

§ 193. Issues, proof, and variance.

Where the statute of limitations is pleaded, and the petition shows upon its face that the claim is barred, no other proof is necessary.

Biggs v. Dawson, 6 Ky. Opin. 415.

Where the jury may have believed from the evidence that appellants were merchants, and also that they were manufacturers and sold the caps as manufacturers and not as merchants, the instruction should have been made complete by saying to them that if they believe these facts from the evidence, the plea of the statute of limitation was unavailing.

Rankin & Co. v. Chenerworth, 5 Ky. Opin. 515.

LIMITATION OF LIABILITY.

By contract with carrier, see Carriers, § 147.

Contract against negligence of carrier invalid, see Carriers, § 150.

LIQUIDATED DAMAGES.

See Damages, § 76.

LIS PENDENS.

§ 3. Actions affecting rights to property involved therein.

§ 6. Commencement and pendency of action.

§ 12. Notice of pendency of action.

§ 14.—Statutory requirements.

§ 22. Operation and effect in general.

§ 23. Purchasers pending suit.

§ 24.—In general.

§ 25.—Persons bound by judgment or decree.

§ 3. Actions affecting rights to property involved therein.

The dismissal of an action to enforce a vendor's lien, because of want of prosecution, can not be regarded as a lis pendens, unless it contains facts affecting the rights of other parties, and in that event notice must be brought directly home to the party to be affected by it.

Ramsey v. Pace, 7 Ky. Opin. 361.

§ 6. Commencement and pendency of action.

A lis pendens is created, as to specific property sought to be subjected to the payment of particular debts, by the commencement of an action for that purpose.

Talbott v. Phillips & Scally, 5 Ky. Opin. 401.

Actual service must be had to constitute lis pendens.

Dickens v. Yelton, 1 Ky. Opin. 377.

§ 12. Notice of pendency of action.**§ 14.—Statutory requirements.**

Where, in an attachment proceeding, a defendant answers, admitting owning property referred to in another suit pending against him, it is sufficient to constitute a lis pendens under the attachment.

Coleman v. Ross, 4 Ky. Opin. 28.

§ 22. Operation and effect in general.

A lis pendens created by an action, can affect only those who are parties to the action and those claiming through them, and only to the extent that the determination of the question involved in the litigation settled the rights of the litigants.

Cravens v. Gray, 6 Ky. Opin. 472.

The doctrine of lis pendens would not apply in favor of the mortgagee, as he could claim no greater title than the mortgagor had.

Edwards v. Graves, 4 Ky. Opin. 473.

Purchasers of land, while suit was pending against the owners for a large amount due on notes, are held to be pendente lite purchasers, and are bound by the judgment subsequently rendered against their vendors.

McKinney v. Wheeler, 3 Ky. Opin. 208.

§ 23. Purchasers pending suit.**§ 24.—In general.**

A purchaser pendente lite can avail himself of no defense other than could have been made by his vendor.

Patrick v. Bohannon, 5 Ky. Opin. 259.

One acquiring property then in litigation is bound by the result of such litigation.

Cornellison v. Gatewood, 10 Ky. Opin. 476.

The filing of a suit to foreclose an indemnifying mortgage, even where it fails technically to set forth a good cause of action, but where the court has jurisdiction of the parties and the subject-matter, amounts to a lis pendens, and one buying the property after such suit is entered is bound to take notice of it.

Eggren v. Bell, 10 Ky. Opin. 572.

Where one claiming an interest in land is named in a suit as defendant concerning it, and thereafter the action is dismissed as to the part of such land wherein he asserts an interest, and thereafter judgment is entered as to other lands, and by mistake his rights are affected, he is not bound by the entry made after the action is dismissed as to him, and one

buying his interest after such dismissal is not a lis pendens purchaser.

Osenton v. Nichols, 13 Ky. Opin. 502.

Where one has purchased land of another and paid for it before a suit is begun to subject it to sale to pay the grantor's debts, he is not a pendente lite purchaser, even if the conveyance is not made until after the action is begun.

Read v. Cassidy, 13 Ky. Opin. 627.

§ 25.—Persons bound by judgment or decree.

One who is a lis pendens purchaser or buys an interest in real estate with notice of the claims of others therein, and of the pendency of a suit to determine such interests, is bound by the judgment entered in such cause.

Norton v. McGonagill, 12 Ky. Opin. 263.

LOAN.

See Contracts, § 194.

By guardian, see Guardian and Ward, § 56.

Executor not required to loan money belonging to estate, see Executors and Administrators, § 106.

To firm by partner, see Partnership, § 74.

LOCAL ACTION.

Proceeding to enforce performance of personal duty, see Action, § 16.

LOCAL LAWS.

See Statutes, § 246.

LOCAL OPTION.

See Intoxicating Liquors, III.

LODGE.

Liability for money borrowed, see Associations, § 19.

LOGS AND LOGGING.

Enjoining cutting and removal of timber, see Injunction, § 52.

Right to float logs on navigable stream, see Navigable Waters, § 15.

LOST INSTRUMENTS.

§ 1. Loss of written instrument.

§ 2. Establishment and restoration.

§ 8.—Evidence.

§ 13. Actions on lost instruments.

Establishing contents of destroyed will, see Wills, § 234.

Filing substitute answer, see Records, § 17.

Probate of lost or destroyed will, see Wills, V, C.

Supplying lost pleading, see Pleading, § 340.

Supplying lost records, see Records, § 17.

§ 1. Loss of written instrument.

The fact that appellant permitted the vendor of appellee to build the fence where it now stands when the written grant was in existence, tends very strongly to establish the conclusion that the production of the writing would have dissipated the claim of appellant.

Campbell Tpk. Co. v. Miller, 4 Ky. Opin. 262.

§ 2. Establishment and restoration.

Where a writing has been lost, it is not improper to admit oral testimony to prove the contents, but it is incumbent upon the party proposing to prove its contents to establish with a reasonable degree of certainty what the paper did contain.

Campbell Tpk. Co. v. Miller, 4 Ky. Opin. 262.

§ 8.—Evidence.

Where the execution of a lost instrument is denied, its execution must be proved, before proof of its contents is admissible, although the petition alleging the loss of the instrument is verified.

Askin v. Orahoad, 6 Ky. Opin. 172.

Where an issue is formed as to value of services rendered in caring for an old man during several years of sickness and up to his death, as well as to whether such services were rendered and not settled for, it is competent on behalf of the claimant against his estate to prove the declarations made by the decedent, showing

that it was his intention to pay liberally for such services, and such claimant may show that the decedent made several wills during the time and provided payment for such services, and the value of such property designated in such wills, for these provisions are admissions of such indebtedness, and the fact that such wills were destroyed will not prevent their contents as to such claim being shown.

Jefferson v. Watson, 13 Ky. Opin. 282.

Where evidence is given showing that a person has sold and conveyed his interest in real estate, parol evidence is admissible to show that the deed is lost, and the contents of such lost instrument may be established by such evidence.

Gill v. DeWitt, 13 Ky. Opin. 945.

§ 13. Actions on lost instruments.

In a controversy over a lost deed of a purchaser, and a denial of joint ownership is set up, evidence aliunde as to recognition by defendant of an exercise of joint ownership by the plaintiff shortly after the alleged purchase, will preponderate.

Martin v. Ray, 3 Ky. Opin. 336.

LOTTERIES.

I. REGULATION AND PROHIBITION.

§ 1. Power to regulate or prohibit.

§ 5. Regulation of management.

II. LOTTERY FRANCHISES, CONTRACTS, AND TRANSACTIONS.

§ 15. Rights and remedies of holders of tickets or shares.

IV. CRIMINAL RESPONSIBILITY.

(B) PROSECUTION AND PUNISHMENT.

§ 28. Indictment or information.

§ 30. Trial.

Raising school funds by lottery, see Statutes, § 122.

I. REGULATION AND PROHIBITION.

§ 1. Power to regulate or prohibit.

Courts have nothing to do with the policy of legislation, and where the general assembly passes an act to incorporate a public library and grants the right to operate a lottery in con-

nection therewith to aid in raising money to maintain it, the courts are not to decide the wisdom of such legislation, but are only required to construe such legislation in accordance to the legislative intention.

Public Library of Kentucky v. Little, 9 Ky. Opin. 646.

In an action by the attorney general against the board of councilmen of the city of Frankfort to enjoin the board from operating a lottery for the benefit of the city schools, it is held that the Act of March 16, 1869, authorizes such lottery, and the injunction was refused.

Commonwealth v. City of Frankfort, 9 Ky. Opin. 829.

If a lottery privilege is immoral in its tendency, the legislature may interfere with it, but the courts can not; as it is the duty of the court to construe and decide what the law is, but it has no power to make a law or to repeal one.

Commonwealth v. City of Frankfort, 9 Ky. Opin. 829.

§ 5. Regulation of management.

Where the statute empowers the city council of Frankfort to devise a lottery scheme and sell it when devised, and the scheme devised was to draw on the ternary plan, holders of any of these classes have no right to draw a single number lottery; and the sureties of the operator of such lottery can not be held liable for prizes sold by him or any one else, if such prizes be sold in a single number lottery.

Meredith v. Barron, 10 Ky. Opin. 642.

Where a statute grants a mere privilege, so long as the purposes for which the act was passed are being accomplished, a failure to use it can not be complained of by the state, since the mere failure to exercise a right or privilege under a grant, in the exercise of which the commonwealth has no interest, can not be held to work a forfeiture.

Webb v. Commonwealth, 10 Ky. Opin. 10.

One who under an existing statute acquires a right to operate a lottery

is not affected by a repeal of the statute, as such a statute is in the nature of a privilege, and where rights have become vested under it the Legislature can not revoke the privilege thus granted.

Webb v. Commonwealth, 10 Ky. Opin. 10.

II. LOTTERY FRANCHISES, CONTRACTS, AND TRANSACTIONS.

§ 15. Rights and remedies of holders of tickets or shares.

A lottery contract between a city and a person, authorizing a lottery on the tenary or three number plan only, does not authorize a single number lottery, and the bondsmen of the operator are not liable either to the city or to the holders of tickets who may be entitled to prizes, where such tickets are issued as a single number lottery.

Meredith v. Barrows, 11 Ky. Opin. 51.

IV. CRIMINAL RESPONSIBILITY.

(B) PROSECUTION AND PUNISHMENT.

§ 28. Indictment or information.

Where an indictment charges that the defendant "unlawfully sold a lottery ticket, a writing purporting to entitle the holder to a prize to be drawn in a lottery in the state of Kentucky," the allegations are too general, and fail to give the defendant notice with sufficient certainty of the particular offense for which he is to be tried, so as to enable him to prepare his defense.

Commonwealth v. Coyle, 4 Ky. Opin. 652.

An indictment charging the setting up, promoting, and managing of a lottery for money, etc., is sufficient.

Wingfield v. Commonwealth, 1 Ky. Opin. 585.

§ 30. Trial.

In view of the very large discretion given to the court and jury, § 1, art. 21, ch. 28, 1 Rev. Stat. 405, pertaining to lotteries, is not within one inhibition of § 17, art. 13 of the Consti-

tution, relating to excessive fines and cruel and inhuman punishment.

Wingfield v. Commonwealth, 1 Ky. Opin. 585.

MAINTENANCE.

See Champerty and Maintenance.

Definition, see Guardian and Ward, § 30.

Devise upon consideration of, see Wills, § 620.

Of infant children of deceased, see Executors and Administrators, § 173.

Of ward, see Guardian and Ward, § 30.

Of wife pending suit for divorce, see Divorce, § 196.

Provision for by will, see Wills, § 730.

Repudiation of contract for, see Descendant and Distribution, § 92.

MALICE.

See Homicide, §§ 10, 13; Malicious Prosecution, III.

Allegation of proof of, see Malicious Prosecution, § 60.

Element of slander, see Libel and Slander, §§ 3, 5.

Implication of, see Homicide, § 286.

Instruction as to, see Criminal Law, § 172.

Instruction defining, see Homicide, § 286.

Proof by circumstantial evidence, see Assault and Battery, § 84.

Proof of, see Homicide, §§ 146, 155.

MALICIOUS PROSECUTION.

II. WANT OF PROBABLE CAUSE.

§ 15. Necessity.

§ 25. Civil actions and proceedings.

III. MALICE.

§ 29. Implied malice in general.

IV. TERMINATION OF PROSECUTION.

§ 34. Necessity.

V. ACTIONS.

§ 46. Pleading.

§ 51.—Termination of prosecution.

§ 53.—Matters of defense.

§ 58. Presumptions and burden of proof.

§ 59.—Probable cause.

§ 60.—Malice.

§ 71. Questions for jury.

§ 72. Instructions.

Discharge of jury without verdict, see Criminal Law, § 181.

II. WANT OF PROBABLE CAUSE.

§ 15. Necessity.

Probable cause, being a question of law as well as of fact, should be defined by the court in its instructions to the jury.

Hart v. Smithson, 5 Ky. Opin. 470.

§ 25. Civil actions and proceedings.

It is no justification for a defendant in a suit for malicious prosecution to show that he was advised by officers and detectives to procure a warrant for plaintiff's arrest.

Nahm v. Aden, 8 Ky. Opin. 82.

In a suit for malicious prosecution, if the defendant in procuring plaintiff's arrest acted maliciously and without probable cause, plaintiff is entitled to recover.

Nahm v. Aden, 8 Ky. Opin. 82.

III. MALICE.

§ 29. Implied malice in general.

Where there is an absence of probable cause for having one prosecuted for crime, the law will imply malice; and it is for the jury to say whether malice existed, first being charged as to what constituted probable cause.

Eddy v. Longshaw, 11 Ky. Opin. 179.

IV. TERMINATION OF PROSECUTION.

§ 34. Necessity.

Even though an order of arrest has been sued out maliciously and without probable cause, unless it has been discharged and the proceeding thereby terminated in the defendant's favor, he can not sustain an action for malicious prosecution or false imprisonment.

Barger v. Cook, 9 Ky. Opin. 584.

V. ACTIONS.

§ 46. Pleading.

§ 51.—Termination of prosecution.

In an action for malicious prosecution, the petition must show a final termination of the prosecution in plaintiff's favor and must show malice and want of probable cause.

Blair v. Meshew, 7 Ky. Opin. 103.

A petition for malicious prosecution is bad when it does not contain an averment either that the plaintiff had been tried and acquitted, or that the prosecution against him had been abandoned, or that final disposition of the case had been made.

Westersthron v. Dunleavy, 9 Ky. Opin. 635.

§ 53.—Matters of defense.

In an action for malicious prosecution, all that the defendant is required to show is that the circumstances were such as would induce a prudent person to believe the party guilty of the offense charged and that defendant acted under such belief when he instituted the prosecution.

Blair v. Meshew, 7 Ky. Opin. 103.

§ 58. Presumptions and burden of proof.

If the facts shown in an action for malicious prosecution were not sufficient to induce the belief on the part of defendant that the charge was proved, and there was probable cause for the prosecution, the law is for the defendant and an instruction that the burden of proof is on plaintiff to show that defendant caused the indictment to be found against plaintiff without probable cause, and to show that the material charges in the indictment were false, and if they were false, and yet defendant had good grounds to believe and did believe them to be true, and in good faith acted on such belief, he was not liable, is a correct statement of the law.

Neale v. Evans, 6 Ky. Opin. 41.

§ 59.—Probable cause.

Although the want of probable cause is negative in its form and character, still it must be proved by some affirmative evidence, unless such proof is dispensed with by the defendant

by pleading the truth of the facts involved in the prosecution.

Neale v. Evans, 6 Ky. Opin. 41.

§ 60.—Malice.

To maintain an action for malicious prosecution, it is necessary to allege and prove that the prosecution was instituted maliciously and without probable cause, both of which elements must concur.

Neale v. Evans, 6 Ky. Opin. 41.

§ 71. Questions for jury.

Where the facts and circumstances are shown from which malice and want of probable cause may be legitimately presumed, the cause may be submitted to the jury.

Blair v. Meshew, 7 Ky. Opin. 103.

§ 72. Instructions.

An instruction which requires the jury to find for the plaintiff in a malicious prosecution cause if the defendant in procuring the plaintiff's arrest did not have probable cause for doing so, is erroneous, for before plaintiff is entitled to a judgment he must show that his arrest was procured maliciously and without probable cause.

Nahm v. Aden, 8 Ky. Opin. 82.

In an action for malicious prosecution, it is the duty of the judge to explain to the jury, when asked by any of the parties to do so, what amounts to probable cause.

Neale v. Evans, 6 Ky. Opin. 41.

MALPRACTICE.

By attorney, see Attorney and Client, § 105.

MANDAMUS.

I. NATURE AND GROUNDS IN GENERAL.

§ 3. Existence and adequacy of other remedy in general.

II. SUBJECT AND PURPOSES OF RELIEF.

(A) ACTS AND PROCEEDINGS OF COURTS, JUDGES, AND JUDICIAL OFFICERS.

§ 24. Courts and judicial officers subject to mandamus.

§ 27. Ministerial acts in general.

§ 28. Matters of discretion.

§ 60. Civil proceedings other than actions.

(B) ACTS AND PROCEEDINGS OF PUBLIC OFFICERS AND BOARDS AND MUNICIPALITIES.

§ 65. County or town boards and officers.

§ 66. Municipalities and municipal officers in general.

§ 72. Matters of discretion.

III. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 154. Petition or complaint, or other application.

Mandating county judge to subscribe for turnpike stock, see Turnpikes and Toll Roads, § 10.

Mandatory injunction, see Injunction.

I. NATURE AND GROUNDS IN GENERAL.

§ 3. Existence and adequacy of other remedy in general.

Mandamus can not be resorted to when plaintiff has appropriate legal remedy, complete and adequate.

Coy v. Munier, 8 Ky. Opin. 677.

II. SUBJECTS AND PURPOSES OF RELIEF.

(A) ACTS AND PROCEEDINGS OF COURTS, JUDGES, AND JUDICIAL OFFICERS.

§ 24. Courts and judicial officers subject to mandamus.

Where a proposition to subscribe to the capital stock of a railroad has been authorized by an act of the Legislature, and a majority voted in favor of the proposition, it is imperative on the county court to subscribe for the stock, and upon failure to do so, mandamus is the proper remedy.

Cumberland & O. R. Co. v. Shumaker, 5 Ky. Opin. 209.

§ 27. Ministerial acts in general.

Where a majority of the voters pronounced in favor of the proposition to subscribe for railroad stock, nothing remained to be done by the county judge except to subscribe for the stock, and in doing so he acts as a ministerial, and not a judicial, officer.

and can be compelled to discharge the duty imposed on him by a writ of mandamus.

Presiding Judge of Washington County v. Cumberland & O. R. Co., 5 Ky. Opin. 519.

Where one has been duly elected by the county court as common-school commissioner and the county judge declines to permit him to qualify, the judge may be mandated to do so, for the act to be performed by him is a purely ministerial act.

Greenup County Court v. Clifton, 12 Ky. Opin. 240.

§ 28. Matters of discretion.

The county court refused to appoint a commissioner to meet with a commissioner of an adjoining county to agree on a plan to erect a bridge over a stream forming the boundary between the two counties, and a mandate was issued by the circuit court requiring the county court to show cause why it so refused, and it was held, upon its showing its county to be very largely indebted and its financial inability to build such bridge, that no mandate would be issued.

Grayson County Court v. Breckinridge County Court, 13 Ky. Opin. 953.

§ 60. Civil proceedings other than actions.

A suit to annul marriage obtained by force or fraud can not be sustained by only the admission of the defendant.

Kelly v. Kelly, 8 Ky. Opin. 268.

(B) ACTS AND PROCEEDINGS OF PUBLIC OFFICERS AND BOARDS AND MUNICIPALITIES.

§ 65. County or town boards and officers.

Where a contractor has secured a judgment against the county for building a bridge, he can compel the county court, by mandamus, to make a levy to raise money to pay such judgment.

Pusey & Summers v. Meade County, 9 Ky. Opin. 510.

Where, in an action against the county judge to mandate him as an of-

ficer, to subscribe for the county to the capital stock of a railroad company and issue the bonds of the county in payment, the judge and the county are defeated, after which citizens, as taxpayers, brought an action to prevent such subscription and issue of bonds, a plea of *res adjudicata* should be sustained, as the termination of the first suit against the county settles the rights of the parties and bars the second action.

Cumberland & O. R. Co. v. Washington County Court, 9 Ky. Opin. 668.

§ 66. Municipalities and municipal officers in general.

A petition asking for a mandate against a city to remove an obstruction in a street is insufficient which fails to allege that the proper authorities of said city had been applied to to remove said obstruction and refused to do so; and an application to the city attorney, is not sufficient, for removing obstructions from streets is not one of the duties of city attorneys.

White v. City of Louisville, 9 Ky. Opin. 146.

Mandamus is a proper action to compel the city council to make a levy pursuant to the statute to raise funds for the use of the schools in the city in procuring school buildings and affording school facilities; and such action is properly brought in the name of the board of trustees of the schools, whose duty it is to provide school facilities and handle and receive the funds for such purpose.

Miller v. Gosnell, 9 Ky. Opin. 322.

§ 72. Matters of discretion.

The writ of mandamus can not be used to control the honest discretion of public officers when they are by the law given a discretion, but may be employed to force a public officer to perform a plain ministerial duty, and an officer refusing to act at all may be mandated.

Carey v. Board of Trustees, Town of Butler, 13 Ky. Opin. 388.

Where the Legislature has authorized the board of councilmen of Newport to levy a tax to build and repair school houses, if, at an election,

a majority of the voters of the city are in favor of doing so, and a majority do vote therefor, and the act gives the board discretion to make the levy or not, such board can not by mandate of the court be compelled to make the levy, for the mere discretion of public officers can not be controlled by the court's mandate.

Mayor of Newport v. Board of Education, 13 Ky. Opin. 493.

III. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 154. Petition or complaint, or other application.

A water company holding a franchise to furnish the city of Louisville and its inhabitants water and furnish an adequate supply of water for sprinkling the streets of said city may be mandated to do so, but this can only be done by a plaintiff showing himself entitled to have such water; and a plaintiff can not maintain an action to force the company to furnish water for sprinkling a street when she does not aver that she resides on, does business or owns property on the street for sprinkling which she requires water.

Fuhring v. Louisville Water Company, 10 Ky. Opin. 197.

MANDATE.

Duty to enter of record in trial court, see Appeal, § 1191.

Judgment of Court of Appeals, equivalent to, see Appeal, § 1186.

Of Court of Appeals, see Appeal, XVII, F.

MANSLAUGHTER.

See Homicide, III, §§ 33, 62.

Erroneous instruction as to, see Homicide, § 309.

Instructions as to, see Homicide, §§ 288, 309.

Involuntary, see Homicide, § 34.

MARK.

Signature by, see Signatures, § 5.

MARRIAGE.

§ 12. Essentials in general.

§ 13.—Common-law requisites.

§ 50. Weight and sufficiency of evidence.

§ 51. Questions for jury.

§ 52. Instructions.

See Bigamy; Breach of Marriage Promise.

Of executrix or administratrix, see Executors and Administrators, § 31.

§ 12. Essentials in general.

§ 13.—Common-law requisites.

Although a marriage may not have been voluntary on the part of the husband, yet subsequent cohabitation with the woman and recognition of her as his wife, constitutes a legal and binding ratification of the marriage.

Glass v. Glass, 7 Ky. Opin. 623.

§ 50. Weight and sufficiency of evidence.

For evidence held sufficient to prove a marriage, see opinion.

Powell v. Calvert, 12 Ky. Opin. 536.

§ 51. Questions for jury.

Whether the marriage relation existed between two persons at a given date is a question for the jury under proper instructions.

Langdon v. Kirtly, 7 Ky. Opin. 630.

§ 52. Instructions.

The court properly instructed the jury as to the common-law marriage, and as to presumptive evidence of marriage and marriage contract.

Langdon v. Kirtly, 7 Ky. Opin. 630.

MARRIED WOMEN.

See Husband and Wife, II, III.

Acknowledgment by, see Acknowledgment, § 25.

Authority to mortgage property, see Husband and Wife, § 119.

Contract for sale of real estate, see Husband and Wife, § 46.

Disabilities and privileges, see Husband and Wife, IV.

Liability for purchase-price of land, see Husband and Wife, § 79.

Liability of separate estate for husband's debts, see Husband and Wife, § 171.

Personal judgment against, see Husband and Wife, § 238.

Power to sell separate estate, see Husband and Wife, § 169.

Proceedings in equity to subject property to her debts, see Husband and Wife, § 161.

Rescission of contract, see Contracts, § 268.

Release of dower as consideration of contract with husband and his creditors, see Husband and Wife, § 80.

Right to devise property, see Wills, § 27.

Right to engage in business, see Husband and Wife, § 92.

Right to license to sell intoxicating liquors, see Intoxicating Liquors, § 58.

Testamentary capacity, see Wills, § 29.

Testamentary disposition by, see Wills, § 4, 27.

When coverture does not prevent running of statute of limitations, see Limitation of Actions, § 73.

MARSHAL.

Bond of, see Officers, § 35.

Duty to pay over public money, see Municipal Corporations, § 183.

Rebuttal of presumption of malice, see Municipal Corporations, § 183.

Removal of dangerous animals from streets, see Municipal Corporations, § 705.

MARSHALING ASSETS AND SECURITIES.

§ 5. Liens or claims against property or funds of different persons.

Where there are two funds and one creditor has a lien upon both, and another creditor upon only one of them, the former is required to satisfy his claims out of the fund, upon which the other creditor has no lien; but this rule of marshaling securities does not apply as between creditor and debtor, but only between different creditors.

Bronson v. Ransom, 11 Ky. Opin. 960.

MASTER AND SERVANT.

I. THE RELATION.

(A) CREATION AND EXISTENCE.

§ 1. Nature and existence of relation in general.

(C) TERMINATION AND DISCHARGE.

§ 30. Grounds for discharge.

§ 34. Actions for wrongful discharge.

§ 40.—Evidence.

II. SERVICES AND COMPENSATION.

(B) WAGES AND OTHER REMUNERATION.

§ 68. Right to wages in general.

§ 72. Additional compensation.

§ 80. Actions for wages.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) NATURE AND EXTENT IN GENERAL.

§ 90. Care required in general.

§ 98. Willful injury by master.

(B) TOOLS, MACHINERY, APPLIANCES, AND PLACES FOR WORK.

§ 101. Nature of master's duty and liability and care required in general.

§ 108. Defective or dangerous machinery.

§ 111. Railroad cars.

§ 112. Railroad tracks and roadbeds.

(D) WARNING AND INSTRUCTING SERVANT.

§ 153. Inexperienced youthful employee.

(F) RISKS ASSUMED BY SERVANT.

§ 206. Dangers incident to nature of work.

§ 216. Incompetency or negligence of fellow servants.

(G) CONTRIBUTORY NEGLIGENCE OF SERVANT.

§ 229. Care required of servant.

§ 237. Dangerous operations and methods of work.

§ 240.—Operation of railroads.

(H) ACTIONS.

§ 284. Questions for jury.

§ 290. Instructions.

§ 295.—Assumption of risk by servant injured.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(A) ACTS OR OMISSIONS OF SERVANT.

§ 300. Nature of master's liability.
See Apprentices.

I. THE RELATION.**(A) CREATION AND EXISTENCE.****§ 1. Nature and existence of relation in general.**

A person who goes to the house of another to share the benefits and hospitalities of the family can not at his own will and pleasure convert himself into a hired servant, without the knowledge or consent of the head of the family.

Grubb's Exr. v. Black, 1 Ky. Opin. 501.

In an action for services performed, the jury should have been instructed that if they believed from the evidence that the plaintiff lived with defendant as a member of his family, and he furnished her food and clothing, and kept no account thereof, and that he had not promised to pay her otherwise for her services, and that after his death she continued to live with his wife in the same way, the law is with the defendant.

Grubb's Exr. v. Black, 1 Ky. Opin. 501.

(C) TERMINATION AND DISCHARGE.**§ 30. Grounds for discharge.**

The employe is bound to treat his employer with respect, to be faithful and reasonably diligent, and to obey all reasonable orders, within the scope of his employment, which may be given by the employer or his agent, for the breach of which the employer may discharge him.

Otis & Co. v. Power, 1 Ky. Opin. 312.

In some service the character and conduct of the employe is immaterial to the employer and forms no element of consideration; but there are employments which from the nature of the service, character and conduct, do constitute elements of the contract and consideration.

Otis & Co. v. Power, 1 Ky. Opin. 312.

§ 34. Actions for wrongful discharge.**§ 40.—Evidence.**

If the plaintiff was discharged, without just cause, and before the end of the time for which the defendant had engaged her services, she had the right to maintain an action for the loss of wages, if she was unable by reasonable effort to obtain other employment.

Otis & Co. v. Power, 1 Ky. Opin. 312.

II. SERVICES AND COMPENSATION.**(B) WAGES AND OTHER REMUNERATION.****§ 68. Right to wages in general.**

A manager of a business, who negligently or by lack of due care, permits one of his sub-employees to overdraw his wages, is personally liable to the employer for same.

Turner v. Tabb, 4 Ky. Opin. 31.

Fair dealing, punctuality in payment of wages, and general good treatment are duties incumbent on the employer, for a breach of which the employe can have his action.

Otis & Co. v. Power, 1 Ky. Opin. 313.

§ 72. Additional compensation.

An employer is liable under a parol agreement for an increase in salary of his employe, where his books show the entry made thereon by the employe, and not objected to by him.

Turner v. Tabb, 4 Ky. Opin. 31.

§ 80. Actions for wages.

Entries by an employe made on the books kept by him can be used to establish a liability for an increase in salary given him by his employer.

Turner v. Tabb, 4 Ky. Opin. 31.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.**(A) NATURE AND EXTENT IN GENERAL.****§ 90. Care required in general.**

The lack of ordinary care by a railroad company may make it liable for the personal injury of one not in its employment, but it can in no case be

liable for the injury or death of its employes unless it is guilty of willful neglect.

Kentucky Cent. R. Co. v. Sommers' Admr., 13 Ky. Opin. 1092.

§ 98. Willful Injury by master.

To authorize a verdict and judgment in a suit against a railroad company for the death of an employe, it must be shown that the life of the deceased was lost by the willful neglect of the defendant or its agents and servants.

Armstrong's Admr. v. Pennsylvania Co., 12 Ky. Opin. 273.

(B) TOOLS, MACHINERY, APPLIANCES, AND PLACES FOR WORK.

§ 101. Nature of master's duty and liability and care required in general.

A servant has the right to expect that the master will exercise all prudent means to avoid danger to him in the course of his employment.

Lexington & Big Sandy R. Co. v. Edward Joepa, 6 Ky. Opin. 662.

§ 108. Defective or dangerous machinery.

An employe has the right to depend upon his employer to furnish safe machinery and appliances with which to work; and where such machinery is defective and so known to the employer, or by the exercise of ordinary care and caution the employer or his agents could have known the machinery was defective, and injury is caused thereby, the employer is liable.

Dyle v. Swift's Iron & Steel Works, 12 Ky. Opin. 184.

§ 111. Railroad cars.

A railroad company is not required to furnish the very best and latest improvement in machinery but only that which is reasonably proper, when judged by what has been shown to be best by experience and use, and the company can not be held to be willfully negligent in the killing of one of its employes because it did not furnish for use the very latest and best improvement, and the company can not be held liable for willful neglect

by its failure to use the latest improved frog.

Young v. Louisville & N. R. Co., 12 Ky. Opin. 758.

§ 112. Railroad tracks and roadbeds.

Even where, at the time an employe of a railroad company engaged in switching cars at night is killed, it is shown that the yard was not lighted, that there was a mud hole along the car tracks, that the quadruple and rail track at the switch bar was dangerous, and that the switch bar at the place where the employe was killed was about three inches above the cross ties when it ought to have been even with them, and while it may have been shown by reason of these conditions the business of switching was rendered more dangerous than if they had been in perfect condition, still in the absence of evidence that deceased lost his life by reason of such defects the plaintiff was not entitled to recover.

Armstrong's Admr. v. Pennsylvania Co., 12 Ky. Opin. 273.

(D) WARNING AND INSTRUCTING SERVANT.

§ 153. Inexperienced or youthful employe.

Where an employer knew of the danger incident to the repairing of machinery, and the employe was inexperienced and did not know of the danger, it was the duty of the employer to inform the employe of the danger and to give him proper instruction.

Swift's Iron & Steel Works v. Reed, 7 Ky. Opin. 661.

Where an employe's position in repairing machinery was dangerous because of the absence of a belt shift, and the employe because of his inexperience was not aware of the danger, it was the duty of the employer to instruct him as to the danger and provide against it.

Swift's Iron & Steel Works v. Reed, 7 Ky. Opin. 661.

(F) RISKS ASSUMED BY SERVANT.

§ 206. Dangers incident to nature of work.

Where in a suit against a transpor-

tation company operating a freight boat on the river, brought by plaintiff on account of his intestate having lost his life in an effort to carry out the orders of the company to retake a barrel which had fallen overboard, there is no evidence of willful neglect or of reckless and wanton conduct towards the intestate in the direction given him to catch the barrel, it is held that the danger was one of the perils attending navigation that he had agreed to risk when accepting the employment and there could be no recovery.

Lillard's Admr. v. Houston Transportation Co., 11 Ky. Opin. 705.

An employe voluntarily assuming a character of labor that is dangerous and is injured is without remedy unless the employer by the exercise of ordinary care and caution could have prevented the injury.

Doyle v. Swift's Iron & Steel Works, 12 Ky. Opin. 184.

§ 216. Incompetency or negligence of fellow servants.

Subordinates engaged at the same time in the same work and with like power and control have no right of recovery against the employer for injuries to each other caused by their own neglect or want of care, since they assume all such risks when they agree to work together as fellow laborers.

Doyle v. Swift's Iron & Steel Works, 12 Ky. Opin. 184.

(G) CONTRIBUTORY NEGLIGENCE OF SERVANT.

§ 229. Care required of servant.

Where plaintiff's intestate, being an employe of a steamboat company, rashly and recklessly placed himself in a position of danger which resulted in the loss of his life, without the fault of his employer, there can be no recovery.

Lillard's Admr. v. Houston Transportation Co., 11 Ky. Opin. 705.

§ 237. Dangerous operations and methods of work.

§ 240.—Operation of railroads.

Where an employe of a railroad company is run over by the company's

cars, no recovery can be had therefor except on the ground that his death resulted from the willful negligence of those in charge of the train.

Butler's Admr. v. Louisville & N. R. Co., 13 Ky. Opin. 420.

Where an employe of a railroad company is killed by the cars of the company, his representatives can only recover on the ground of willful negligence of the company, since the railroad company can not be held liable for ordinary negligence.

Chatrarol R. Co. v. Leftwitch's Admr., 13 Ky. Opin. 480.

(H) ACTIONS.

§ 284. Questions for jury.

Whether the employe had knowledge of the risk he was assuming, or, by the exercise of ordinary prudence and caution, could have avoided the danger, were questions for the jury under proper instructions.

Swift's Iron Steel Works v. Reed, 7 Ky. Opin. 661.

Whether an employer exercised reasonable care to avoid injury to his servant, is a question for the jury.

Lexington & Big Sandy R. Co. v. Joepa, 6 Ky. Opin. 662.

§ 290. Instructions.

§ 295.—Assumption of risk by servant injured.

An instruction on assumed risk by a servant, that ordinary risks of service mean such risks as were known to the servant at the time he entered upon the service, although erroneous, was held not to mislead the jury, in view of other instructions given.

Lexington & Big Sandy R. Co. v. Joepa, 6 Ky. Opin. 662.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(A) ACTS OR OMISSIONS OF SERVANT.

§ 300. Nature of master's liability.

A master is not liable for the willful and tortious acts of his servant, where the party injured is a stranger, unless

the act was directed to be done or afterwards ratified by the master.

Board of International Imp. v. Hall, 4 Ky. Opin. 659.

Where the relationship between the master and the party injured by the master's servant is such as implies a contract that no injury shall be inflicted by the servant, the master is liable for the willful and tortious acts of his servant resulting in injury to the third party.

Board of International Imp. v. Hall, 4 Ky. Opin. 659.

MASTER COMMISSIONERS.

Report and exceptions to, see Infants, § 73.

MATERIALMEN'S LIENS.

See Mechanics' Liens.

MAYHEM.

§ 1. Nature and elements of offense.

Where an accused person is charged with mayhem, he is guilty where the evidence shows that he bit off the lip of his antagonist.

Swan v. Commonwealth, 12 Ky. Opin. 226.

MAXIMS.

He who comes into equity must come with clean hands, see Equity, §§ 3, 10, 65.

MEASURE OF DAMAGES.

See Damages, VI.

For injury to property, see Damages, § 103.

Personal injuries cases, see Damages, VI, A.

MECHANICS' LIENS.

I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.

§ 9. Property which may be subject to lien.

§ 10.—In general.

§ 12.—Corporate property.

II. RIGHT TO LIEN.

(A) NATURE OF IMPROVEMENT.

§ 25. Erection or construction.

(B) SERVICES RENDERED AND MATERIALS FURNISHED.

§ 47. Materials used, but not incorporated in work.

(D) PERSONS ENTITLED IN GENERAL.

§ 81. Laborers and other unskilled workmen.

(E) SUBCONTRACTORS, AND CONTRACTORS' WORKMEN AND MATERIALMEN.

§ 99. Notice to and consent of owner.

III. PROCEEDINGS TO PERFECT.

§ 117. Notice to owner.

§ 121.—Time for notice.

IV. OPERATION AND EFFECT.

(C) PRIORITY.

§ 198. Liens and incumbrances in general.

V. ASSIGNMENT OF LIEN OR CLAIM.

§ 204. Effect of assignment of debt or claim.

VI. WAIVER, DISCHARGE, RELEASE, AND SATISFACTION.

(A) WAIVER OF RIGHT TO LIEN.

§ 209. Implied waiver in general.

§ 213. Taking mortgage on same property.

VII. ENFORCEMENT.

§ 258. Jurisdiction.

§ 260. Time to sue, limitations, and laches.

§ 261. Parties.

§ 263.—Defendants.

§ 278. Evidence.

Building erected by husband on wife's land, see Husband and Wife, § 25.

Lien for labor and supplies furnished railroad, see Railroads, § 159.

Necessity of exceptions to rulings on evidence, see Appeal, § 260.

I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.

§ 9. Property which may be subject to lien.

§ 10.—In general.

The mechanics' lien law of February 17, 1858, does not apply to work and labor performed in the erection of the earthwork of a railroad track, since the mere earthwork of a rail-

road can not be regarded as a structure in the sense that the term is used in the act.

Hagan v. English & Murphy, 5 Ky. Opin. 467.

The lien of a mechanic or materialman attaches to the building and land upon which it stands when the labor is performed and the material is used in the construction.

Graves v. Collins & Son, 8 Ky. Opin. 667.

§ 12.—Corporate property.

Under the provisions of an act to provide for liens for laboring men and supply men (Gen. Stat., § 944), employes of a railroad company have liens for their wages wherever the property and effects of the road can be distributed amongst the creditors; but laboring men can have no lien for labor done to improve, construct or repair such road under any other circumstances.

Dennis v. Bibbs, 9 Ky. Opin. 751.

II. RIGHT TO LIEN.

(A) NATURE OF IMPROVEMENT.

§ 25. Erection or construction.

Where one agrees to erect a house for another, and the real estate is sold before completion, and the buyer agrees to pay such contractor in cash and by the surrender of a claim against him, such contractor has a mechanic's lien for the balance due him over such surrendered indebtedness.

Jeter v. McCarty, 9 Ky. Opin. 610.

(B) SERVICES RENDERED AND MATERIALS FURNISHED.

§ 47. Materials used, but not incorporated in work.

Mechanics and materialmen are allowed liens upon the buildings erected by them, or out of their materials and upon the estate of the debtor in the land upon which the building stands, but the mere promise by the purchaser that he will use the material in the construction of a building does not give to the material man a lien on such land.

Graves v. Collins & Son, 8 Ky. Opin. 667.

(D) PERSONS ENTITLED IN GENERAL.

§ 81. Laborers and other unskilled workmen.

Laborers performing labor on one contract have a joint lien on the work and property, but no single lien can be taken on a claim for less than \$10, and where a joint lien is asserted it is not necessary that each single lien should be \$10 or more, but such liens may be added together and if the aggregate is \$10 or more the lien may be enforced.

Mulliken v. Leiber, 13 Ky. Opin. 939.

(E) SUBCONTRACTORS, AND CONTRACTORS' WORKMEN AND MATERIALMEN.

§ 99. Notice to and consent of owner.

A mechanic's lien asserted by a subcontractor is unavailing where a written notice, as required by the statute, has not been given.

Hall v. O'Donnell, 3 Ky. Opin. 495.

Where the laborer gives notice before payment by the employer that he looks to the property or improvement for his pay, he acquires a lien that can be enforced as if he had been the original contractor, and after such notice if the employer pays money to the original contractor or his assignee he does so at his peril.

Mulliken v. Leiber, 13 Ky. Opin. 939.

III. PROCEEDINGS TO PERFECT.

§ 117. Notice to owner.

§ 121.—Time for notice.

A mechanic is only entitled to a lien for work in constructing a building when he files a notice of his lien within sixty days from the time such labor ceases, and he waives his lien by failing to file his notice within the time prescribed; and where, after he ceases to work in the construction of a mill, but engages to work for its owners on a salary in running the mill, a statement filed by him seven months after the construction work was done by him but within sixty days from the time he ceased work in running

the mill is not sufficient to secure him any lien.

McHenry v. Rome Mill Company,
10 Ky. Opin. 871.

IV. OPERATION AND EFFECT.

(C) PRIORITY.

§ 198. Liens and incumbrances in general.

Laborers, mechanics and materialmen, under the provisions of the act of 1876, are entitled to liens on a building erected or repaired by them or for which they furnished the labor or materials; and where a mortgage is executed after the date of said act the parties to it must be held to have contracted with reference thereto, and such mortgage is second to such liens.

Miller v. McCrory, White & Co.,
11 Ky. Opin. 625.

V. ASSIGNMENT OF LIEN OR CLAIM.

§ 204. Effect of assignment of debt or claim.

A bona fide purchaser from the owner of property upon which an improvement has been made or work done, is protected, but an assignee of a contractor can take no greater right than the contractor himself had; and he can not be protected as against those who as between the contractor and the employer have superior liens.

Mulliken v. Leiber, 13 Ky. Opin.
939.

VI. WAIVER, DISCHARGE, RELEASE, AND SATISFACTION.

(A) WAIVER OF RIGHT TO LIEN.

§ 209. Implied waiver in general.

Where builders of a house, received an order on the owner for their portion of the work done, and presented it, which was accepted, they will be entitled to assert their lien for a balance due them, the acceptance of the personal order not being a waiver of the lien.

Porter & Brooks v. Anderson & Wainman, 3 Ky. Opin. 348.

§ 213. Taking mortgage on same property.

One having a lien as a materialman

waives it by accepting a mortgage for the same claim and electing to pursue his remedy thereon.

Goodnight v. Adsit, 11 Ky. Opin.
157.

VII. ENFORCEMENT.

§ 258. Jurisdiction.

The holder of a mechanic's lien not having brought a suit in the state court to enforce it prior to the defendant's filing his petition in bankruptcy court for his discharge in bankruptcy, he can not maintain his suit in the state court.

Rouse v. Jones, 10 Ky. Opin. 156.

§ 260. Time to sue, limitations, and laches.

No action can be maintained to foreclose a mechanic's lien after twelve months have elapsed from the date of the completion of the work or furnishing the materials.

Walter & Struck v. Wooley, 8 Ky.
Opin. 337.

§ 261. Parties.

§ 263.—Defendants.

Where the landlord was not made a defendant in foreclosing a mechanic's lien against his property for improvements erected by the tenant, until more than one year after such work was done and until after the tenant was dispossessed, no recovery can be had against the landlord's real estate.

Walter & Struck v. Wooley, 8 Ky.
Opin. 337.

The landlord must be made a defendant in an action to foreclose a mechanic's lien against real estate for improvements which have been made thereon by the tenant.

Walter & Struck v. Wooley, 8 Ky.
Opin. 337.

§ 278. Evidence.

The evidence was held not to show that plaintiffs held a mechanic's lien on the property in question.

Lloyd & Tribble v. Queen, 6 Ky.
Opin. 113.

MERGER.

By execution of deed, see Deeds,
§ 94.

Of accounts into note, see Account, § 1.

Of judgment on appeal to circuit court, see Appeal, § 3.

Of leasehold into fee, see Landlord and Tenant, § 60.

Of note into judgment, see Bills and Notes, § 540.

MILITIA.

§ 19. Civil liabilities of members of militia.

The necessity for seizing private property in violation of the provisions of the Constitution of the state was held not so insistent and overwhelming as to leave "no legal avoidable alternative."

Mercer v. Humphrey, 7 Ky. Opin. 141.

Militia officers were held to have no authority to give one the right to commit a trespass upon the property of citizens.

Mercer v. Humphrey, 7 Ky. Opin. 141.

MINES AND MINERALS.

II. TITLES, CONVEYANCES, AND CONTRACTS.

(C) LEASES, LICENSES, AND CONTRACTS.

§ 56. Nature of mining lease and agreements.

§ 61. Construction and operation of mining leases.

§ 72. Construction and operation of oil and gas leases.

§ 77.—Surrender, abandonment, or forfeiture.

§ 82. Construction and operation of licenses and contracts.

§ 83.—Rights and liabilities of parties.

II. TITLES, CONVEYANCES, AND CONTRACTS.

(C) LEASES, LICENSES, AND CONTRACTS.

§ 56. Nature of mining lease and agreements.

Where the proof shows that a lead in a mine would not terminate at a point contemplated by the parties to

the contract for lease of a mine, but at a point wholly impracticable to reach the coal to be mined, only nominal damages for destruction thereof could be recovered.

Trabue v. Sanders & Williams, 4 Ky. Opin. 153.

Where a written mining lease is executed and acknowledged, but is taken away and kept in the possession of the lessee for some time before being returned for record, and when returned it has been altered in material parts, so as to give possession of the land for agricultural purposes to the lessee, the lessor is entitled to take the possession of such land for such purposes.

Spreen v. Whitney, 9 Ky. Opin. 60.

§ 61. Construction and operation of mining leases.

It is the duty of the lessee to so work a leased mine as not to render unnecessarily difficult the mining of such coal as they might choose or be compelled to leave at the expiration of their term.

Trabue v. Sanders & Williams, 4 Ky. Opin. 153.

A petition seeking to recover damages for the removal of pillars in a mine, stipulating "to preserve the main entry by leaving pillars on either side sufficient to support it," is not demurrable, though the plaintiffs could not recover as in trover and conversion.

Trabue v. Sanders & Williams, 4 Ky. Opin. 153.

Where a lease permits the lessee to mine coal, but requires him to preserve the "main entry," by leaving pillars sufficient on either side to support it, and "with this exception" to removed all coal, etc., the words in the form of an exception amounted to a covenant to preserve the supports and leave open the passageway so as to preserve the entry itself.

Trabue v. Sanders & Williams, 4 Ky. Opin. 153.

A plea in defense to a suit for violation of a contract, that by reason of opening up of a new passageway and closing of the old one, in that more

and better coal was thus left than was taken from the pillars supporting the portion of the entry destroyed, is not good.

Trabue v. Sanders & Williams, 4 Ky. Opin. 153.

A criterion of damages is the difference in the value of the mines in the condition they were restored to plaintiff on the day the lease expired, and what their value would have been in case "pillars sufficient to preserve and leave open," the main entry had been left as stipulated in the lease.

Trabue v. Sanders & Williams, 4 Ky. Opin. 153.

The inquiry in an action for damages to a mine should be confined to the difference in value on the day the lease expired, and should exclude any consideration of the value of the entry as a passage-way.

Trabue v. Sanders & Williams, 4 Ky. Opin. 153.

§ 72. Construction and operation of oil and gas leases.

Where an oil lease, providing for a payment of \$50.00 per year for not commencing work thereunder, this penalty is lost by a subsequent surrender and acceptance of the lease. Such a payment, provided for, can not be held as an amount due for rent, but merely a penalty for non-performance.

Meek v. Preston, 3 Ky. Opin. 205.

§ 77.—Surrender, abandonment, or forfeiture.

Where, by the terms of an agreement between the lessor and the lessee, a mining company, the stock of the company is forfeited to the lessor, the latter succeeded to the rights of the company, and took the lease subject to the liens, legally created, before the forfeiture.

Alexander's Exrs. v. Airdee Coal Co., 7 Ky. Opin. 329.

§ 82. Construction and operation of licenses and contracts.

§ 83.—Rights and liabilities of parties.

The lessees in a mining lease were held to have restored the mine to the lessor in a more valuable condition

than they were obliged to do under the terms of the lease.

Trabue v. Lander, 6 Ky. Opin. 652.

MISCONDUCT.

As ground for new trial, see New Trial, II, B.

Of attorney in argument of case, see Appeal, § 248.

Of juror as ground for new trial, see New Trial, II, D.

MISJOINER.

Of causes of action, see Action, § 43.

Of parties plaintiff, see Parties, § 85.

Of parties, see Parties, § 75.

Waiver of misjoinder of actions, see Action, § 45.

MISREPRESENTATIONS.

As to boundaries of land, see Contracts, § 258.

MISTAKE.

As ground for new trial, see New Trial, § 91.

As ground for reformation of instrument, see Reformation of Instruments, § 17.

As to quantity of land sold, see Vendor and Purchaser, §§ 32, 34, 60, 65. Correction of mistake in award, see Arbitration and Award, § 63.

Equity jurisdiction of, see Equity, § 5. Ground for reformation of instrument, see Reformation of Instruments, §§ 15, 19.

In draft of deed, see Deeds, § 69.

In execution of deed, see Deeds, § 69.

In issuing bond, see Bonds, § 48.

In order of judicial sale, see Judicial Sales, § 37.

Limitation of action for fraud or mistake, see Limitation of Actions, § 60.

Payment by, see Payment, § 78.

Relief from mistake in contract, see Contracts, § 93.

MITIGATION.

Of damages, see Libel and Slander, § 111.

MODIFICATION.

Power of Court of Appeals to modify judgment or order, see Appeal, § 1146.

MONEY.

Legal tender, see Tender, § 10.
Meaning of, see Wills, § 566.

MONEY LENT.

§ 1. Nature and grounds of obligation.
There is no natural lien for money loaned, and liens to secure loans are secured only by agreement to that effect by the borrower.

Spalding's Exr. v. Hager, 13 Ky. Opin. 441.

MONEY PAID.

§ 1. Nature and grounds of obligation.

§ 4. Persons entitled.

§ 1. Nature and grounds of obligation.
Plaintiff in an action for money paid on a debt of another must prove an actual indebtedness on the part of defendant to the person to whom the money was paid, before plaintiff can recover.

Brady v. Lanham, 6 Ky. Opin. 147.

§ 4. Persons entitled.

When a plaintiff has been instrumental in causing the property of a stranger to be sold, the property not belonging to the defendant, the purchaser at such sale may recover back the price paid from such plaintiff.

Clements v. Green, 8 Ky. Opin. 803.

MONEY RECEIVED.

§ 8. Money wrongfully obtained.
§ 13. Persons entitled.

§ 8. Money wrongfully obtained.

Where one collects money without right, the law implies a promise to repay it.

Nutter v. Miller, 7 Ky. Opin. 367.

An action for money had and received is the proper remedy, where

defendant presented a claim for and received money for timber belonging to plaintiff, which was used by the federal army during the civil war.

Grimes v. Trimble, 6 Ky. Opin. 703.

§ 13. Persons entitled.

Where an attorney received money which belonged to another and deposited it in a bank to his own account, and died leaving a portion of it on deposit in the bank, the person so entitled to it may have it applied to the satisfaction of his claim.

Smith v. Alexander, 7 Ky. Opin. 367.

MORTGAGES.

I. REQUISITES AND VALIDITY.

(A) NATURE AND ESSENTIALS OF CONVEYANCES AS SECURITY.

§ 1. Nature of mortgage in general.

§ 4. Mortgage distinguished from other transactions.

§ 6.—Conditional sale.

§ 8.—Trust or power.

§ 9. Property which may be subject of mortgage.

§ 10.—Nature of property.

§ 11.—Title or interest of mortgagor in general.

§ 13.—After-acquired property.

§ 14. Debts or liabilities which may be secured.

§ 15.—In general.

§ 16.—Future advances.

§ 18.—Indemnity mortgages.

§ 31. Absolute deed as mortgage.

§ 32.—In general.

(B) FORM AND CONTENTS OF INSTRUMENTS.

§ 48. Description of property.

§ 50. Description of debts or liabilities secured.

§ 54. Special stipulations and provisions.

(C) EXECUTION AND DELIVERY.

§ 59. Acknowledgment.

(D) VALIDITY.

§ 76. Capacity and assent of parties in general.

§ 78. Fraud and misrepresentation.

§ 79. Duress.

§ 80. Undue influence.

- § 83. Estoppel or waiver as to defects or objections.
- § 88. Cancellation for invalidity.

III. CONSTRUCTION AND OPERATION.

(C) GENERAL RULES OF CONSTRUCTION.

- § 109. Evidence to aid construction in general.

(B) PARTIES AND DEBTS OR LIABILITIES SECURED.

- § 112. Parties secured.
- § 114. Debts secured in general.

(C) PROPERTY MORTGAGES, AND ESTATES OF PARTIES THEREIN.

- § 134. Title of mortgagor in general.

(D) LIEN AND PRIORITY.

- § 146. Scope and extent of lien.
- § 148. Waiver or loss of lien.
- § 149. Priorities of debts or obligations secured by same mortgage.
- § 150. Priorities of liens or incumbrances existing before acquisition of property by mortgagor.
- § 151. Priorities of mortgages in general.
- § 166. Notice affecting priority.
- § 169.—Constructive notice in general.
- § 177. Circumstances and transactions subsequent to mortgage affecting priority.
- § 181.—Release, satisfaction, or discharge of mortgage.

IV. RIGHTS AND LIABILITIES OF PARTIES.

- § 187. Possession or control of property.

V. ASSIGNMENT OF MORTGAGE OR DEBT.

- § 234. Transfer of debt or obligation secured.
- § 236.—Part of debt.
- § 239. Validity.
- § 241. Operation and effect in general.
- § 255. Equities and defenses between original parties.
- § 257.—Bona fide assignees of mortgage.

VI. TRANSFER OF PROPERTY MORTGAGED OR OF EQUITY OF REDEMPTION.

- § 271. Right of mortgagor to sell and convey.

- § 274. Title and rights of purchaser in general.

- § 277. Liability of purchaser or grantee for mortgage debt in general.

VII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

- § 298. Payment of debt.
- § 309. Release in general.
- § 310. Partial release.
- § 315. Effect of release or satisfaction.

IX. FORECLOSURE BY EXERCISE OF POWER OF SALE.

- § 372. Title and rights of purchaser.

X. FORECLOSURE BY ACTION.

(B) RIGHT TO FORECLOSE AND DEFENSES.

- § 394. Default in payment.
- § 395.—In general.
- § 410. Rights of junior incumbrancers.
- § 414. Conditions precedent.
- § 415. Defenses.
- § 417. Persons entitled to foreclose.

(D) LIMITATIONS AND LACHES.

- § 425. Laches.

(E) PARTIES AND PROCESS.

- § 426. Parties in general.
- § 427. Necessary or indispensable parties.
- § 428. Plaintiffs.
- § 429.—In general.
- § 430. Trustees in trust deeds.

(F) PLEADING AND EVIDENCE.

- § 444. Bill, complaint, or petition.
- § 446.—Mortgage and indebtedness.
- § 447.—Description of property.
- § 454. Plea, answer, or affidavit of defense.

- § 460. Presumptions and burden of proof.

(G) INJUNCTION AND RECEIVER.

- § 465. Preservation and protection of property in general.
- § 466. Appointment of receiver.
- § 467.—In general.

(I) JUDGMENT OR DECREE AND EXECUTION.

- § 483. Nature and essentials of judgment in general.
- § 485. Scope and extent of relief.
- § 486.—In general.

(J) SALE.

§ 500½. Nature and essentials in general.

§ 512. Sale in parcels or in gross.

§ 525. Report or return.

§ 529. Opening or vacating and actions to set aside.

§ 532. Rights of purchaser in general.

§ 533. Property and rights passing by sale.

§ 547. Rents and profits.

§ 548.—In general.

§ 554. Conveyance to purchaser.

(L) DISPOSITION OF PROCEEDS AND SURPLUS.

§ 563. Disposition in general.

§ 564. Prior liens and incumbrances.

§ 566. Debts or obligations secured by same mortgage.

(N) FEES AND COSTS.

§ 581. Attorney's fees.

§ 600. Amount required to redeem.

XI. REDEMPTION.

§ 605. Tender and payment into court.

See Acknowledgment; Chattel Mortgages; Covenants; Pledges.

Authority of married women to mortgage property, see Husband and Wife, § 119.

By corporation, see Corporations, § 475.

Burden of proof in suit to set aside mortgage as fraudulent, see Fraudulent Conveyances, § 270.

Cancellation of release of mortgage, see Cancellation of Mortgages, § 2.

Conditions precedent to cancellation of mortgage, see Cancellation of Instruments, § 21.

Conveyance by wife as security for husband's debt, see Husband and Wife, §§ 157, 159.

By wife to secure husband's debt, see Husband and Wife, § 69.

Equity of redemption subject to execution, see Execution, § 36.

Estoppel by, see Estoppel, § 29.

Executed by married women, see Husband and Wife, § 85.

Executed in another state on lands in this state, see Contracts, § 2.

Foreclosure proceeding against husband and wife, see Homicide, § 212.

In fraud of creditors, see Fraudulent Conveyances, § 174.

Limitation of action on sealed instruments, see Limitation of Actions, § 22.

Of homestead, see Homesteads, § 115.

Of mortgagee, see Estoppel, § 94.

Priority between attachment and mortgage lien, see Attachment, § 180.

Priority of purchase-money mortgage, see Vendor and Purchaser, § 260.

Railroad mortgage, see Railroads, § 162.

Record of deed of trust constructive notice, see Deeds, § 79.

Scope of deed of trust, see Deeds, § 111.

When mortgage lien inures to benefit of surety, see Principal and Surety, § 170.

I. REQUISITES AND VALIDITY.**(A) NATURE AND ESSENTIALS OF CONVEYANCES AS SECURITY.****§ 1. Nature of mortgage in general.**

Where it sufficiently appears that the stated consideration of a conveyance was wholly or chiefly for borrowed money, such conveyance was made and accepted as collateral security only.

McGinnis v. Robinson, 1 Ky. Opin. 401.

There being a borrowing and lending, prima facie, deeds in pursuance thereof are to be considered as security for the indebtedness.

Larkins v. Garnett, 1 Ky. Opin. 364.

A presumption of law, that deeds are security for indebtedness, may be strengthened by parol evidence.

Larkins v. Garnett, 1 Ky. Opin. 364.

§ 4. Mortgage distinguished from other transactions.

The Union Bank of Louisiana, having a judgment against L. S. & Co., obtained through them a deed from K. to 200 acres of land for the debt, L. S. & Co., which became the surety of said K., having obtained the money for him from said bank, it constituted a mortgage for the benefit of the bank.

Price v. Levy, Summers & Co., 3 Ky. Opin. 715.

A bond which in fact is executed to secure a debt is a mortgage, and though not recorded is valid as between the parties and those having knowledge of it; and where the mortgagee is placed in possession in a suit to annul the bond and divide the bond, it is proper for the court to refer the case to a commissioner to take proof of the state of the accounts between the mortgagee and mortgagor, charging the mortgagee with the reasonable rents of the land during the time he has held the possession.

Talle v. Talle, 12 Ky. Opin. 410.

§ 6.—Conditional sale.

The evidence was held to show that a transaction amounted to a conditional sale of land, and not a mortgage.

Hall v. Lee, 6 Ky. Opin. 366.

§ 8.—Trust or power.

To constitute a mortgage or deed of trust, the right of property must be changed and the title vested in the grantee or vendee.

Hutchinson v. Irvin, 1 Ky. Opin. 348.

§ 9. Property which may be subject of mortgage.

§ 10.—Nature of property.

Where a mortgagor's real estate is sold on execution, thereafter he has nothing to mortgage except his equity of redemption, and where he does not redeem within the year the holder of such mortgage has no lien on the property.

Howard v. Hunter's Admr., 13 Ky. Opin. 513.

§ 11.—Title or interest of mortgagor in general.

Where a testator owned a five-sixths interest in real estate and his wife owned the other interest, his attempt by will to convey the whole of the land will fail; and where his devisees take possession under the will and mortgage it, the mortgagee will only have a lien on the interest which the testator owned; and the fact that the wife had accepted the will under which she was a legatee and said nothing about her claim of ownership to the one-sixth interest until it is sought to foreclose the mortgage does not estop her from asserting her interest as

against the mortgagee and the mortgagors.

Bryson v. Osenton, 11 Ky. Opin. 383.

§ 13.—After-acquired property.

A mortgage of property to be acquired in the future is void, and while such a mortgage may be valid as a contract to assign and not as an assignment of a present interest, such a right can not be enforced as against the creditors of the mortgagor.

Skillman v. Frost's Exr., 11 Ky. Opin. 900.

§ 14. Debts or liabilities which may be secured.

§ 15.—In general.

Where a first mortgage lien is to secure the principal and interest at a given rate in a renewal of the notes, the parties thereto can not, as against other creditors and lienholders, agree to an increase of the interest and thereby enlarge the debt.

Phillips v. Bannister, 9 Ky. Opin. 588.

Where it is stipulated in a mortgage that it is to secure certain described debts, and in a suit to foreclose it there is no allegation of a mistake, it can not be construed to secure other indebtedness than that described therein.

Lee & Foster v. Walker's Admrs., 10 Ky. Opin. 98.

To prevent fictitious and fraudulent claims being asserted, a mortgage on real estate should in itself show the nature of the lien, and with reasonable certainty the amount of the debt intended to be secured by it, and if the debt is not ascertained, then such description as will tend to put others upon inquiry.

Frazer v. Tallafiero, 13 Ky. Opin. 395.

§ 16.—Future advances.

Where a mortgage is executed to secure future advances, and a statement contained in it shows it was to secure the sum of \$150 that day advanced, which was not true, but thereafter \$54.55 worth of goods were advanced to the mortgagor, and it is not shown that the false statement was inserted for a fraudulent purpose or that appel-

lant was misled by it to his prejudice, the mortgage is valid as security for the advances actually made on the faith of the mortgage.

Miller v. Daniel, 10 Ky. Opin. 429.

§ 18.—Indemnity mortgages.

Where a party takes a mortgage on land for the sole purpose of indemnifying himself as surety, he does not thereby waive his right to the enforcement of a prior lien on the land, previous to the taking of the mortgage, for a different liability.

Pindell v. Brown, 6 Ky. Opin. 302.

The holder of an indemnity mortgage is entitled to recover out of the mortgaged property a sum of money equal to the amount of money he has become liable for by reason of the mortgagor's failure to satisfy the claim upon which the mortgagee has become liable.

Herd v. Eversole, 11 Ky. Opin. 597.

Where the real estate of H. was mortgaged to secure his debt to P., and after its foreclosure C. agreed to mortgage his land to P. as security for any excess of indebtedness over what H.'s land would bring at the sale, on condition that P. would not have any decree issued on his judgment against H. until January 1, 1875, and when that time came P. did nothing looking to the sale of H.'s land, but allowed his judgment of foreclosure to stand without any sale; and in January, 1883, the wife of H. paid on her husband's debt to P. the sum of \$2,000, and in consideration of such payment P. released to her his entire interest in the land decreed to be sold, and thereafter proceeded to foreclose the mortgage he had taken on C.'s land, it was held that C.'s land was only mortgaged to pay the balance of the debt remaining after the sale of H.'s land, and that P. could not enforce his mortgage against C. until after he had forced H.'s land to be sold under his decree.

Chandler's Admr. v. Phillips & Scully, 13 Ky. Opin. 770.

§ 31. Absolute deed as mortgage.

§ 32.—In general.

The inadequacy of the purchase price should have a controlling influ-

ence on the chancellor in determining whether a deed, absolute on its face, was not intended by the parties to be a mortgage.

Justice v. Martin, 5 Ky. Opin. 60.

Where A. advanced to B. money to redeem lands sold under execution, with right of redemption, and took a deed from B. to A., in consideration therefor, in a subsequent execution by creditors to subject the land to other liens, B.'s conveyance to A. is a mortgage creating a prior lien on the land.

Johnson v. Nunn, 4 Ky. Opin. 347.

A deed absolute on its face may be shown to have been executed as a mortgage and to secure a debt.

Berry v. Berry, 9 Ky. Opin. 598.

In case of irreconcilable conflict in the evidence of the parties to an absolute deed claimed to have been a mortgage, the court will take as true the party's evidence which is consistent with the motives that ordinarily control the action of persons alive to their own interests, and will hold as false the party's evidence showing a course pursued which is inconsistent with the motives ordinarily controlling the action of parties to a business transaction.

Cline v. Fallis, 10 Ky. Opin. 773.

Where a father to relieve his son from financial embarrassment took a conveyance from the son of his real estate and paid off the son's debts, amounting to \$1,700, obligating himself to reconvey to the son upon payment of the debt, and the father by will provided that the son should receive back his \$1,700 note, the obligation of the father to reconvey is binding upon his executors and heirs.

Robinson v. Robinson, 11 Ky. Opin. 8.

When land is conveyed to secure a debt, the grantee holds it as trustee for the real owner; and where the grantor remains in possession, such possession is enough to place buyers from such grantee upon their guard.

McGeorge v. Lytle, 13 Ky. Opin. 868.

Where land is conveyed absolutely and the grantee agrees to reconvey on

the grantor's paying a certain sum of money the transaction amounts to a mortgage only, and where such grantor fails to pay such sum but retains possession it will not give the grantee the right to possession but gives him only the right to foreclose his mortgage and subject the land.

Coffey v. Ranney, 13 Ky. Opin. 107.

Where the owner of real estate borrows money of another and executes a deed conveying to him his farm as security and also executes to him notes for the amount and takes back from him a bond for a deed, all being executed at the same time, they are in legal contemplation but one transaction and it may be shown by parol that such deed was intended to be a mortgage.

Snoddy v. Boles, 13 Ky. Opin. 607.

An absolute deed may be shown by evidence to be a mortgage; and where such a conveyance is made to create a lien only to secure an open account, and the account is barred by the statute of frauds, the mortgagor may have his title quieted as against such claim.

Fitzsimmons v. Flynn, 13 Ky. Opin. 950.

(B) FORM AND CONTENTS OF INSTRUMENTS.

§ 48. Description of property.

Where the number of a lot mortgaged is incorrectly given in the mortgage, but the description otherwise is amply sufficient to identify the property, no one can be misled by it and it is sufficient.

Murphy v. Hambleton, 10 Ky. Opin. 742.

§ 50. Description of debts or liabilities secured.

Where a mortgage expressly states the sum secured by it, and that it was to secure the mortgagee, the failure to describe the notes in the mortgage or to designate the parties to whom payable, does not invalidate the mortgage.

Richards v. Seward, 10 Ky. Opin. 411.

A mortgage of real estate is held to be sufficient in describing the debt se-

cured and the real estate, where the exact amount of the debt is given, but where the debt is evidenced by several notes and the notes are not mentioned in the mortgage and where the description of the real estate is "A certain tract of land containing 287½ acres, lying in the county of Logan, state of Kentucky, being the property of said J. N. Hutchinson," such descriptions are sufficient to put subsequent purchasers and creditors upon inquiry.

Frazer v. Talifero, 13 Ky. Opin. 395.

§ 54. Special stipulations and provisions.

A stipulation in a mortgage that the debt should become due on the failure of the mortgagor to keep up the insurance or to pay rent, is legitimate, and a violation of such stipulation will entitle the mortgagee to proceed to enforce his demand.

Miller v. McCrory, White & Co., 11 Ky. Opin. 625.

(C) EXECUTION AND DELIVERY.

§ 59. Acknowledgment.

Where a mortgage is acknowledged by a married woman in accordance with the statute, and when its contents have been explained to her by the officer before whom acknowledged, before she can have such mortgage canceled she must aver and prove facts showing that it was not read and explained, or that it was not acknowledged, or other facts to avoid the instrument.

Duerson v. Gardner, 8 Ky. Opin. 350.

A certificate to a mortgage is not invalid when it is made as if by the clerk in person but signed "J. T. Bynum, D. C., for John A. Willson, C. F. C."

Hume v. Maddox, 10 Ky. Opin. 184.

(D) VALIDITY.

§ 76. Capacity and assent of parties in general.

Where a woman attended school when a child, learning to read and write, married when she grew up,

bore children, attended to her household duties, purchased articles for her family with some care and judgment, exchanged her lands, signed and acknowledged deeds, had law suits and gave testimony, and generally attended with fair judgment to the ordinary affairs of life, such facts shown by the record will support the conclusion that she had capacity to make a mortgage as decided by the trial court, and the opinions of witnesses to the contrary, based upon no particular facts or circumstances giving them weight, can not be permitted to outweigh the many acts of ordinary intelligence done by her before she executed the mortgage.

Elbridge v. Wilson's Admr., 12 Ky. Opin. 106.

§ 78. Fraud and misrepresentation.

In order that a mortgage, alleged to have been given to prefer creditors may be attacked, action must be commenced by some creditor within the time required by statute.

Anderson v. Glenn, 2 Ky. Opin. 509.

A mortgagee is a purchaser for value, and when he accepts a mortgage without notice of fraud or mistake, he is protected even if the mortgagor acted fraudulently.

Lewis v. Carr, 12 Ky. Opin. 376.

§ 79. Duress.

It does not constitute duress where, at the time that the wife acknowledges a mortgage before the clerk of the court, the officer stated to her that in case of the death of her husband the mortgage would secure the payment of the debt due the mortgagee, and that such mortgagee would enter suit unless the mortgage was signed; since such statement does not destroy the force of the clerk's certificate that her acknowledgment was made voluntarily before him.

Moore v. Miller, 10 Ky. Opin. 736.

§ 80. Undue influence.

Where one, having no mind to comprehend the character of a transaction, is by reason of his mental trouble and distress influenced by the parties to execute a mortgage and deed conveying all of his estate, and it is clear that he received no considera-

tion, such a conveyance will be set aside.

Abraham v. Strater, 12 Ky. Opin. 624.

§ 83. Estoppel or waiver as to defects or objections.

Where a partnership is a creditor of another firm, and a member of such creditor firm is also executor of an estate which is also a creditor of said other firm, and said member induces said debtor firm to execute a mortgage to secure the debt due his firm, he can not afterward, as executor, be allowed to attack the validity of such mortgage.

Masonic Savings Bank v. Ronald's Exr., 10 Ky. Opin. 720.

§ 88. Cancellation for invalidity.

The violation of a contract which inflicts no injury upon the claimant, does not authorize the setting aside of a mortgage regularly executed and delivered.

House v. Wilson, 7 Ky. Opin. 507.

III. CONSTRUCTION AND OPERATION.

(A) GENERAL RULES OF CONSTRUCTION.

§ 109. Evidence to aid construction in general.

Where the terms of a mortgage are plain and unmistakable, and the signature of the mortgagor and her acknowledgment are unquestioned, it is conclusive, and will not be varied because the mortgagor believed that the agreement was other than that plainly recited in the mortgage.

Carmack v. Check & Dent, 10 Ky. Opin. 532.

(B) PARTIES AND DEBTS OR LIABILITIES SECURED.

§ 112. Parties secured.

Where a will directs the executor to sell the testator's real estate and divide the proceeds equally between his four children, the legatees, even though married women, may in advance of such sale mortgage their respective interests, and upon sale the mortgagee is entitled to the funds de-

rived therefrom as to such interests after the payment of the costs of administration and the testator's debts.

Schwarz v. Griffith's Exr., 13 Ky. Opin. 872.

§ 114. Debts secured in general.

Where a mortgage is executed by a corporation to its president to secure him in his future endorsement of the corporation's paper, and to enable it to continue to conduct its business and secure money for that purpose, and a note of \$3,000 held by the bank, upon which the mortgage is surety, evidencing a debt of the corporation existing prior to the mortgage, is presented for payment, \$500 paid thereon, and the mortgage shown to the bank, and it was thereby induced to accept a renewal for the remainder of the debt, such renewal note is secured by such mortgage, and the mortgagee is estopped by the representations made to the creditor at the time of the renewal of the note, on the faith of which the bank was induced to renew it and give further time, to controvert its right to resort to the mortgage as security for the note.

Kentucky Nat. Bank v. Bank of Louisville, 10 Ky. Opin. 845.

(C) PROPERTY MORTGAGED AND ESTATES OF PARTIES THEREIN.

§ 134. Title of mortgagor in general.

The burden of proof is on the grantor in a mortgage to show the property to be a separate estate, in order to exempt it from the operation of a mortgage.

Passmore v. Willson, 5 Ky. Opin. 436.

(D) LIEN AND PRIORITY.

§ 146. Scope and extent of lien.

Where it is stated in a mortgage that it is given to secure named debts and to secure other indebtedness not described, such a mortgage will not create a lien as against purchasers of the property described in the mortgage.

Lee & Foster v. Walker's Admrs., 10 Ky. Opin. 98.

§ 148. Waiver or loss of lien.

One holding a prior mortgage does not defeat his lien by surrendering it and the note secured by it, where he is led to do so by being given a check for the amount, and upon representations that the check would be paid and that the money was in the bank, but such check is protested and never paid.

Taylor v. Finlayson, 10 Ky. Opin. 497.

§ 149. Priorities of debts or obligations secured by same mortgage.

A mortgage to secure a number of notes maturing at different times secures all, and there is no priority.

Whipp v. Wolford, 8 Ky. Opin. 22.

§ 150. Priorities of liens or incumbrances existing before acquisition of property by mortgagor.

The owner of real estate can not by mortgaging it defeat a bona fide claim for balance money when the creditor by express provision reserved a lien on such real estate.

Sander's Assignee v. Duvall, 8 Ky. Opin. 642.

§ 151. Priorities of mortgages in general.

Where the mortgagee's suretyship on a replevin bond was simultaneous with the mortgage for his indemnity, his claim on account of the replevin bond has priority over all others.

Moore v. Moore, 3 Ky. Opin. 654.

While a mortgagee could have his lien asserted prior to other creditors, no exceptions having been made to the commissioner's report at the time, a purchaser under the foreclosure proceedings cannot afterwards be ousted.

Berryman v. Roberts, 3 Ky. Opin. 608.

The lien of a levy on execution where made and returned, and notes of such return are shown on the records, is prior to the lien of a mortgage executed after levy made.

Greer v. Howard, 11 Ky. Opin. 755.

§ 166. Notice affecting priority.

§ 169.—Constructive notice in general.

No mortgage or deed of trust con-

veying a legal or equitable title to real estate or personalty is valid against a purchaser for a valid consideration without notice thereof, until it shall be acknowledged or proved according to law and lodged for record, although such a deed or mortgage is valid as between the parties to it.

Blue v. Hoover, 12 Ky. Opin. 53.

§ 177. Circumstances and transactions subsequent to mortgage affecting priority.

§ 181.—Release, satisfaction, or discharge of mortgage.

One holding a second mortgage does not become a first lienholder when the first mortgage is satisfied of record by reason of false representations of the debtor, who gives a worthless check in payment, and the second mortgagee has parted with nothing on the strength of such release.

Taylor v. Finlayson, 10 Ky. Opin. 497.

IV. RIGHTS AND LIABILITIES OF PARTIES.

§ 187. Possession or control of property.

A mortgagee in possession cannot be ousted until the mortgage be satisfied.

McMichael v. McMichael, 3 Ky. Opin. 613.

A mortgagee of the deceased mortgagor has the right to have a judgment of distribution of assets of the estate corrected.

Berryman v. Roberts, 3 Ky. Opin. 608.

V. ASSIGNMENT OF MORTGAGE OR DEBT.

§ 234. Transfer of debt or obligation secured.

§ 236.—Part of debt.

Where two notes are secured by one mortgage, and by assignment become the property of different persons, a judgment on one of them may not be levied on the mortgaged property so as to affect the lien of the owner of the other note, and a purchaser at such a judicial sale takes the property

subject to the lien of the holder of the other note.

Garrin v. Barren, 10 Ky. Opin. 584.

§ 239. Validity.

Facts as to dismissal of a suit to foreclose a mortgage, and a receipt given in full liquidation by acceptance of rent notes by a mortgagor, were held sufficient to declare fraudulent a subsequent assignment of the mortgage, and denial of genuineness of the receipt.

Page v. Crawford, 2 Ky. Opin. 604.

§ 241. Operation and effect in general.

The benefit of the mortgage passed as an incident when the notes they secured are assigned, but the legal title remained in the mortgagee, and he is a necessary party to an action for its foreclosure.

Chambers v. Wool Growers Bank, 5 Ky. Opin. 758.

The assignees of mortgage notes are the beneficial owners of the mortgage executed to secure their payment, but they are not vested with the legal title thereto.

Chambers v. Wool Growers Bank, 5 Ky. Opin. 758.

§ 255. Equities and defenses between original parties.

§ 257.—Bona fide assignees of mortgage.

One who accepts a mortgage on real estate, or takes an assignment of a mortgage, where there is nothing of record showing any lien by execution, nor of title by purchase under execution, nor any notice, actual or constructive to such mortgagee or assignee of any lien or encumbrance on the land, such mortgagee or his assignee is an innocent purchaser for value.

Buckwalter & Campbell v. Bartlett, 10 Ky. Opin. 747.

VI. TRANSFER OF PROPERTY MORTGAGED OR OF EQUITY OF REDEMPTION.

§ 271. Right of mortgagor to sell and convey.

Where mortgaged property is sold by the mortgagor with the consent of the mortgagee, the lien of the mort-

gagee does not attach to the proceeds of the sale in the hands of the mortgagor.

Eaker v. Albritton, 6 Ky. Opin. 598.

§ 274. Title and rights of purchaser in general.

Where a mortgage is placed on record, it becomes evidence to all the world that the mortgagee has a claim of some kind against the mortgagor, and if a person deals with the mortgagor without making inquiry thereof, he can not insist that the mortgagee should suffer instead of himself.

Anderson v. Adams, 7 Ky. Opin. 44.

§ 277. Liability of purchaser or grantee for mortgage debt in general.

Among purchasers of different portions of mortgaged property the common burden must be borne ratably; and where a partnership debt is secured by a mortgage on partnership real estate, and also on real estate belonging to one of the partners, the partnership realty can not be required to be exhausted before selling the mortgaged realty of the member of the firm.

Murphy v. Boyd, 10 Ky. Opin. 798.

VII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

§ 298. Payment of debt.

The mere renewal of a note is not the payment of the debt so as to affect the mortgage lien as security for its payment.

Stein v. Grotenkemper, 12 Ky. Opin. 39.

§ 309. Release in general.

Where the consideration of a release of a mortgage was that the releasors should hold a certain plantation, the release was not without consideration because the releasee already held the plantation under a decree of court, the effect of such decree being doubtful and the release agreement having the effect of quieting their title to the plantation.

Eldridge v. Bromley's Exrs., 6 Ky. Opin. 746.

A release of a mortgage executed to one individually was held to be intended as a release of the party in her representative capacity, where she was not individually indebted to the releasors, but was indebted to them in her representative capacity, and all the circumstances clearly show the purpose and application of the release.

Eldridge v. Bromley's Exrs., 6 Ky. Opin. 746.

§ 310. Partial release.

A mortgagee should not be compelled to surrender his lien on any of the property embraced in the mortgage until all parties in interest are brought into court and their respective interests are adjudged.

Dilworth v. Murphy, 6 Ky. Opin. 322.

§ 315. Effect of release or satisfaction.

Where a mortgage becomes released under a judgment, a mortgage given to indemnify the surety on the original undertaking also becomes released.

Perry v. Cafer, 6 Ky. Opin. 368.

IX. FORECLOSURE BY EXERCISE OF POWER OF SALE.

§ 372. Title and rights of purchaser.

Where the real estate of the husband is sold on mortgage foreclosure and bought in by the creditor and conveyed by him to the wife of the debtor, and paid for by her out of means not secured from the husband, there is no fraud on the creditors of the husband, and such property is not liable for his debts.

Buddy v. Phipps & Johnson, 8 Ky. Opin. 176.

X. FORECLOSURE BY ACTION.

(B) RIGHT TO FORECLOSE AND DEFENSES.

§ 394. Default in payment.

§ 395.—In general.

Where by the terms of an agreement one has the right to redeem real estate conveyed to secure money loaned to him, the holder of the title, when it is not redeemed, may by a

proper pleading have the property sold to pay the money for which it was pledged.

Beall v. Bethel, 10 Ky. Opin. 289.

§ 410. Rights of junior incumbrancers.

In the absence of record notice, a mortgagee of an undivided interest in lands is held to be entitled to a foreclosure, as against an unrecorded bond for title executed prior to the mortgage.

Smith v. Smith, 4 Ky. Opin. 322.

§ 414. Conditions precedent.

A mortgagee can not enforce a mortgage against persons in possession of the land at the time the mortgage was executed, without first establishing the existence of the claims which it purports to secure, whether the conveyance to the persons in possession was fraudulent or not.

Chapman v. Fehler & Co., 7 Ky. Opin. 394.

§ 415. Defenses.

The failure of a mortgagee to assert his claim for many years, while the property is still in the hands of his principal who thereby could use the same for the purpose of inducing others to become his surety, or to disclose his lien when the property is being disposed of, are cogent circumstances against the justness of his claim.

Stone & Skinner v. Lyon, 2 Ky. Opin. 517.

In a suit to foreclose a mortgage, where there are nonresident defendants and one minor defendant, no question can be raised as to the requirements of the proceeding as to such defendants by an adult defendant who is served with process, and who appears in the action and makes no objection to the judgment or sale and confirmation until long after confirmation.

Vaughn v. Robinson, 13 Ky. Opin. 1136.

§ 417. Persons entitled to foreclose.

Where a mortgagee did not present his claim before the bankruptcy court in a proceeding by the mortgagor, the mortgagee may subsequently foreclose his mortgage against the mort-

gaged property, no personal judgment being sought against the bankrupt.

Jayne v. Preston's Exr., 7 Ky. Opin. 90.

Appellant obtained control of the mortgage by the assertion of an unfounded claim against the estate of his father, and is, therefore, responsible for the loss of the debt by reason of not instituting a suit to collect it in the lifetime of the mortgagor.

Smith v. Smith's Heirs, 5 Ky. Opin. 166.

(D) LIMITATIONS AND LACHES.

§ 425. Laches.

A holder of a mortgage, who for ten or twelve years is cognizant of a suit in relation to the property mortgaged, and does not appear and present his claim for adjudication, is held guilty of laches.

Moore v. Moore's Admr., 3 Ky. Opin. 277.

(E) PARTIES AND PROCESS.

§ 426. Parties in general.

Where M gave B a mortgage, as a lien for B becoming M's mortgage, as a note to I and the note was transferred to S, in a suit by the administrator to M to settle the estate and have the mortgage foreclosed, B was the only necessary party to such foreclosure proceedings.

McNamara v. Sibley, 4 Ky. Opin. 397.

§ 427. Necessary or indispensable parties.

All the holders of a series of rates secured by mortgage must be made parties to foreclosure, and the rights of each may be determined therein.

Whipp v. Wolford, 8 Ky. Opin. 22.

§ 428. Plaintiffs.

§ 429.—In general.

Where one takes a mortgage on a horse and some land to indemnify him from loss by becoming surety for others, and has to pay the debt, he may foreclose such mortgage; and where the mortgagors claim they were not the owners of the property when they

executed the mortgage, but the proof fails to sustain their claim, such defense fails.

Smith v. Turner, 9 Ky. Opin. 522.

§ 430. Trustees in trust deeds.

Where a trustee holds a mortgage for bondholders, a majority of such holders may require him to enter suit; and whether such a suit was properly brought in the name of the trustee alone or not, the ratification of the foreclosure sale by a majority of the bondholders removes any doubt of the validity of the title of the purchaser.

Lentz v. Louisville & Jefferson County Ass'n, 8 Ky. Opin. 332.

(F) PLEADING AND EVIDENCE.

§ 444. Bill, complaint or petition.

In foreclosure proceedings, where several parties are interested, the facts should be stated so that the court may determine that other parties are interested, and should be joined as defendants, and to be a good defense the facts must also be shown, and how the interest accrued, to enable the court to determine the question.

Lee v. Christy, 2 Ky. Opin. 556.

§ 446.—Mortgage and indebtedness.

Only the mortgage and obligation it secures, or copies thereof, need be filed in a suit to foreclose, and no evidences of the mortgagor's title need be filed.

Lentz v. Louisville & Jefferson County Ass'n, 8 Ky. Opin. 332.

§ 447.—Description of property.

Where real estate is properly described in a mortgage, the mortgage is not void because it does not describe the real estate as being in a named county, the action to enforce the mortgage being local, and the petition alleging that the real estate is in such named county, it is sufficient.

Ross v. Mechanics' Mut. Sav. Ass'n of Newport, 10 Ky. Opin. 757.

§ 454. Plea, answer, or affidavit of defense.

Where an answer to a petition to foreclose a mortgage shows undis-

closed payments, and a charge of usury, the defendant is entitled to time for preparation, and an order of discovery.

McNamara v. Sibley, 4 Ky. Opin. 397.

If it appears that the wife had no power to divest herself of title, facts should be pleaded setting up such want of power.

Duerson v. Gardner, 8 Ky. Opin. 350.

§ 460. Presumptions and burden of proof.

Where one, by payment of the purchase-price of land as surety, became substituted to the rights of the mortgagee, in a suit to enforce his rights under the mortgage, he has a prima facie right to a judgment upon the pleadings, and the burden is on the defendant to make out his defense.

Gentry v. Whittaker, 7 Ky. Opin. 341.

(G) INJUNCTION AND RECEIVER.

§ 465. Preservation and protection of property in general.

The chancellor has the power and should protect the parties in their rights under his decree, and he may compel the surrender of the possession of mortgaged property pending litigation, to prevent it being carried out of his jurisdiction or converted, and may, by proper orders, compel a party to the suit to bring into court the proceeds or value of mortgaged property converted pending the suit.

Cord v. Goggin, 12 Ky. Opin. 146.

§ 466. Appointment of receiver.

§ 467.—In general.

The mortgagee, in an action to foreclose, may have a receiver appointed to collect the rents and take charge of the property, where it is shown that the mortgaged property is in danger of being lost, removed or materially injured and that the property is probably insufficient to discharge the mortgage debt, but when no receiver is appointed the mortgagee is not entitled to such rents.

Huston, Johnson & Co. v. Strow, 8 Ky. Opin. 603.

(I) JUDGMENT OR DECREE AND EXECUTION.**§ 483. Nature and essentials of judgment in general.**

In foreclosure proceedings, where several parties are interested, the judgment must show the particular interest of each, to determine their standing in the issue.

Lee v. Christy, 2 Ky. Opin. 556.

A judgment decreeing the sale of real estate in a mortgage foreclosure must contain a reasonably accurate description of the real estate sufficient to enable the master to identify the land he was directed to sell, without searching the records.

Douglass v. Stone, 8 Ky. Opin. 669.

§ 485. Scope and extent of relief.**§ 486.—In general.**

Where certain parties hold liens on a part of the real estate covered by a subsequent mortgage, which is foreclosed, they are entitled to judgment that other property of the defendant covered by the mortgage be first sold and the proceeds applied to the payment of the mortgage debt before the sale of the real estate upon which they hold liens.

Zeigler v. Means, 8 Ky. Opin. 221.

On a petition on a note to foreclose a mortgage securing it, a plaintiff is not entitled to a judgment subrogating him to the supposed rights of another.

Sulzer & Bro. v. Kentucky Furniture Co., 9 Ky. Opin. 72.

(J) SALE.**§ 500½. Nature and essentials in general.**

Where a judgment directs the commissioner to sell so much of the land as may be necessary to pay the installment of the purchase-money then due and sued for, if the whole tract would not bring more or not even enough to pay same, that fact would not deprive the judgment creditor of his right to his judgment and the execution thereof, other instalments being not yet due.

Lee v. Christy, 2 Ky. Opin. 556.

§ 512. Sale in parcels or in gross.

Where a mortgage covered an entire tract of land supposed to embrace two hundred and sixty-seven acres, and is ordered sold in foreclosure and offered, but no person offered to pay the debt for any less number of acres, and the land was cried off to the plaintiff upon his offer to take the land for his judgment and costs, and the sale is confirmed, this is conclusive that it was in gross and not by the acre.

Beazley v. Mershan, 10 Ky. Opin. 782.

In the foreclosure of a mortgage on real estate the court may consider the question as to whether a division of the lots described was practicable and to the interest of the parties; and where a tract is divided into a number of parcels and offered first in parcels and then as a whole, the rights of the parties are not lessened or prejudiced by the court's action in such subdivision of the property. Such a sale is not void and the purchaser and the parties are not injured.

Weller v. Bissell, 11 Ky. Opin. 604.

Where a commissioner is appointed to sell land under a foreclosure of a mortgage and is ordered to have the land surveyed and platted, and to sell the tracts separately as platted, the court not designating the order in which said platted tracts are to be offered for sale, the commissioner may use his own discretion as to the part of the land to be first offered for sale.

Perry v. Torian, 12 Ky. Opin. 358.

§ 525. Report or return.

Where no exceptions are filed to the report of sale of real estate, and no action thereon had by the court, no appeal can be prosecuted from the report of such sale.

Hurst v. Phillips, 11 Ky. Opin. 101.

§ 529. Opening or vacating and actions to set aside.

A mortgage or sale of property not at the time subject to the claims of creditors can not be set aside at the instance of creditors.

Williams v. Warner, 8 Ky. Opin. 635.

Where a sale of property on decree of foreclosure is set aside, and on a resale is purchased by a second buyer, who pays a part of the purchase-money, and on appeal by the first purchaser said second sale is set aside and the first sale confirmed, the second purchaser is entitled to a rule requiring the repayment of his purchase-money.

Pfingst v. Wilson's Exr., 9 Ky. Opin. 488.

§ 532. Rights of purchaser in general.

A purchaser at a foreclosure sale acquires no title, legal or equitable, as will deprive the distributees of their right to enforce against the mortgaged property their judgment obtained to recover back the overplus paid the mortgagor by the mistake of the commissioner.

Edwards v. Graves, 4 Ky. Opin. 473.

A note executed by a purchaser of land at foreclosure sale, to the trustee in the sale, for moneys advanced with which to discharge the purchase, does not become a lien on the land to the exclusion of creditors of the purchaser.

Northern Bank v. Anderson's Admr., 3 Ky. Opin. 488.

§ 533. Property and rights passing by sale.

Where, in a foreclosure suit, the mortgagor and the person in possession of the mortgaged land are made parties defendant, but the mortgagor was not served with process, and failed to appear, the land of the person in possession can not be sold to pay the mortgagor's debt.

Jones v. Rice, 6 Ky. Opin. 655.

Where a mortgage on real estate expressly reserves a homestead right, the fact that a senior mortgage covers the entire land will not authorize the chancellor to sell the homestead to satisfy that mortgage, and the remainder of the land to pay the second mortgage.

Buckner & Terrell v. Samuels, 13 Ky. Opin. 363.

§ 547. Rents and profits.

§ 548.—In general.

Where the mortgagor, without an

express contract for rent under a sale of the property, is permitted to retain possession, he will not be held for rent.

McElroy v. Barbee, 4 Ky. Opin. 165.

In a mortgage foreclosure, where there are second liens and their holders are parties and all matters are adjudicated, the priorities of liens settled and the property sold and the second lienholders whose securities are inadequate make no effort to have a receiver appointed to collect rents, they have no cause of action against either the mortgagor or mortgagee for such rents.

Clemmons v. Connell, 8 Ky. Opin. 301.

The mortgagor of real estate is entitled to receive the rents, and the tenant having leased such premises and paid the rent for the term, or having agreed to pay it to the owner, can not be required to pay such rent to the mortgagee before he receives title through foreclosure.

Huston, Johnson & Co. v. Strow, 8 Ky. Opin. 603.

§ 554. Conveyance to purchaser.

The court having construed a deed as being a mortgage and ordered a sale to liquidate the debt for which the deed was executed, the mortgagee cannot then be required to warrant the title to the purchaser at the foreclosure sale, since he can only be required to reconvey such title as he received from the grantor.

Garvin v. Free, 2 Ky. Opin. 608.

(L) DISPOSITION OF PROCEEDS AND SURPLUS.

§ 563. Disposition in general.

A mortgagee can acquire no greater right by his mortgage and foreclosure than the mortgagor had, and a sale under the mortgage will not affect the right of distributees to a recovery out of the land of the overplus paid to the mortgagor through a mistake of the commissioner, as his distributable portion.

Edwards v. Graves, 4 Ky. Opin. 473.

§ 564. Prior liens and incumbrances.

Upon a subsequent sale of mortgaged property, the former mortgagee will be entitled to a prior claim upon the sale funds, out of which his lien will be first settled.

Higginson v. White, Roach & Co.,
2 Ky. Opin. 535.

§ 566. Debts or obligations secured by same mortgage.

Where one executes a mortgage securing the mortgagee as surety, also a creditor of the mortgagor, the mortgagee on sale of the property must apply the proceeds to the payment of the debt on which the mortgagee is surety, and then apply the balance, if any, to the individual debt of the mortgagor.

Pindell v. Brown, 6 Ky. Opin. 302.

(N) FEES AND COSTS.**§ 581. Attorney's fees.**

Where attorney's fees are claimed by a mortgagee in a suit to foreclose his mortgage, a junior incumbrancer may, by pleading and proof, object to the attorney's fees and have the court to pass upon the same.

Clemmons v. Connell, 8 Ky. Opin. 388.

§ 600. Amount required to redeem.

An agreement between the holder of a first mortgage and the mortgagor to pay usurious interest for an extension of time, not made of record, even if binding on the parties, can not bind the holder of a second mortgage on the land accepted without notice of any such agreement.

Haydon v. Hart, 11 Ky. Opin. 845.

XI. REDEMPTION.**§ 605. Tender and payment into court.**

Physical restraint and mental disability is an equitable excuse for not making a precise tender for redemption, and a court of equity will require one to surrender this advantage and accept the amount to which he is legally entitled.

Snow v. Dick, 2 Ky. Opin. 73.

MORTUARY TABLES.

Admissibility of, see Evidence, § 364.

MOTIONS.

§ 1. Nature of proceeding.

§ 10. Time for moving.

§ 62. Construction and operation of orders in general.

For nonsuit, see Dismissal and Nonsuit, § 44.

Judgment on motion, see Judgment, V. Necessity of motion presenting objection, see Appeal, § 236.

To correct clerical misprision, see Appeal, § 73.

To quash execution, see Execution, § 159.

Requiring commonwealth to elect upon which count it will proceed, see Criminal Law, § 1162.

§ 1. Nature of proceeding.

A clerical misprision must be corrected by motion, in the tribunal where made.

Davis v. Powell, 3 Ky. Opin. 420.

§ 10. Time for moving.

A motion to vacate an order forfeiting a recognizance must be made at the same term at which such order is made.

Commonwealth v. Sheritt, 3 Ky. Opin. 421.

§ 62. Construction and operation of orders in general.

If a proceeding by motion is erroneous, appearance to the motion and making the same defense that could have been made in a suit on the bond in question, constitutes a waiver of such error.

Cecil v. Gardner, 5 Ky. Opin. 21.

MOTIVE.

For arson, see Arson, § 31.

Of judge in rendering decision, see Trial, § 387.

Ex. M.
11/8/15



